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No. 84-

IN THE

Supreme Court of the United States

October Term, 1984

CROWN LIFE INSURANCE COMPANY, et al.,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether there is the plurality of actors required to establish a violation of Section 1 of the Sherman Antitrust Act, when the alleged conspirators are an insurance company, one of its general agents (a corporation) and an officer of each of those corporations?

II. Whether a classic group boycott, with a life insurance general agent as target, can exist if the only participants in the alleged concerted refusal to deal are, on the suppliers level, a single life insurance company and one of its senior officers, and on the distributor level a corporation, and one of its principal officers, seeking designation as the successor general agent in the territory in which the target has exclusive rights?

III. Whether the *per se* antitrust violation analysis should be applied to an agreement between an agent and its life insurance supplier to terminate the supplier's only other agent in a particular territory, where no price control factor is involved?

IV. Whether a contract by a life insurance company appointing a general agent for soliciting applications for life, health and accident insurance is part of the "business of insurance" within the meaning of the McCarran-Ferguson Act?

PARTIES TO THE PROCEEDINGS

Petitioners Crown Life Insurance Company and Clarke Burton Lloyd were appellees/cross-appellants below on the issues presented for review.[1] Clark Burton Lloyd is an individual, a Canadian citizen and a resident of Chicago, Illinois. Respondent Malley-Duff & Associates, Inc. was appellant/cross-appellee below on the issues presented for review. Malley-Duff & Associates, Inc. is a Pennsylvania corporation which has its office in Pittsburgh, Pennsylvania.

Crown Life Insurance Company is a partially owned subsidiary of Extendicare, Inc., a publicly owned corporation with its headquarters in Toronto, Ontario, Canada.

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1. The other parties who were appellees/cross-appellants below are Agency Holding Corporation, an Illinois corporation, Agency Holding Corporation, an Ohio corporation and Kerry Patrick Craig, an individual. These parties are seeking review by this Court under a separately filed petition.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Crown Life Insurance Company and Clarke Burton Lloyd respectfully request that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Third Circuit entered on May 7, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals (A1-A33) is reported at 734 F.2d 133. The District Court's ruling granting Petitioners' motion for a directed verdict on the antitrust claims (C1-C10) is not officially reported. The order relating to post-trial motions (B1-B2) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 7, 1984. Petitioners filed a timely petition for

rehearing and a suggestion for *en banc* consideration. On June 4, 1984, these were denied (D1-D2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976), provides in relevant part:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to

the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

STATEMENT OF THE CASE

1. Proceedings Below

Respondent Malley-Duff & Associates (hereinafter "Malley-Duff"), was general agent in the Pittsburgh area for Petitioner Crown Life Insurance Company (hereinafter "Crown"), a Canadian corporation engaged in the business of selling life, health and accident insurance, under a general agency contract which contained the following provision:

> This agreement may be terminated on one month's notice by either party and such notice will be deemed to be given when a registered letter containing the notice is mailed, addressed to the party entitled to the notice at the party's last known address.

Under date of January 11, 1978, Crown wrote by registered mail to Malley-Duff giving notice of termina-

tion pursuant to the above quoted provision, effective one month from the date of mailing the letter. Opinion, A9.[2]

On April 5, 1978, Malley-Duff filed an action against Crown and Lloyd and Agency Holding Corporation of Illinois and Agency Holding Corporation of Ohio, Crown's general agents in Chicago and Cleveland, and an individual, Kerry Patrick Craig (hereinafter "Craig"), complaining about the termination of its general agency contract with Crown Life, and setting forth eight counts (Civil Action No. 78-373-W.D. Pa.). This action asserted claims under the federal antitrust laws for conspiracy and monopolization and, under the common law of Pennsylvania, for breach of contract, malicious interference with the contract, conspiracy, concerted refusal to deal and for punitive damages. At the conclusion of Malley-Duff's evidence, a directed verdict was granted by the trial court in favor of all of the defendants on each of the counts asserting a violation of the antitrust laws and the count charging breach of contract. The other common law claims were permitted to go to the jury. The jury found that there was no liability for tortious interference with a contractual relation and no liability for a conspiracy with the intent to injure, and refused to assess punitive damages. The defendants were found to be liable in the amount of $900,000 on a theory of conspiracy to tortiously interfere with a contract.

Both parties appealed to the Third Circuit. The Third Circuit reversed the trial court, reinstated the antitrust counts and threw out the jury verdict against the defendants. *See* Opinion, A1-A33.

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2. References to "Opinion" are to the Third Circuit's decision in this case, a copy of which is contained in Appendix A.

2. Factual Background

On January 11, 1978, Crown wrote to Malley-Duff giving notice of its intent to terminate Malley-Duff as its general agent in Pittsburgh pursuant to the express provisions of the general agency contract. Opinion, A9. Crown had repeatedly warned Malley-Duff that its representation of Crown in the Pittsburgh market had been grossly inadequate. Despite these warnings, Malley-Duff's production continued to lag. On August 19, 1977, Petitioner Lloyd wrote Malley-Duff and set forth a standard of production that was expected of Malley-Duff in order to retain its status as the Crown Life general agent in Pittsburgh. Opinion, A8. This warning was repeated by letter two months later. Malley-Duff failed to improve its marketing efforts. Lloyd recommended that Malley-Duff be terminated as general agent. This recommendation was adopted. Upon the request of Malley-Duff the termination was reconsidered by Crown, but Lloyd's superiors, Michael Hutchison, Marketing Vice President of Crown and Robert Dowsett, President of Crown, adhered to the decision to terminate Malley-Duff.

During the years immediately prior to the decision to terminate Malley-Duff, the production of that agency had leveled off. This leveling of production occurred at a level just in excess of five million dollars annually. That figure represents the threshhold at which a Crown general agent is rewarded with a bonus, in addition to regular commissions, the bonus being computed on the $5,000,000, as well as on any additional production. The production level regularly attained by Malley-Duff indicated that once this threshhold was attained and the bonus received, no further effort was expended. Crown recognized this fact and urged Malley-Duff to increase its penetration in the Pittsburgh market. These requests

went unheeded and Crown then instituted production quotas.

Testimony elicited by counsel for Malley-Duff at trial and exhibits introduced into evidence by Malley-Duff in this action preclude Malley-Duff from asserting that there existed any competition between Malley-Duff and the agency operated by Jules Ehrman, another insurance agency operating in Pittsburgh. They also preclude Malley-Duff from asserting that Lloyd had an ownership interest in Agency Holding Corporation.

At the trial, Malley-Duff called as its witness, as for cross examination, one of the defendants, Clarke Lloyd. To questions posed by Malley-Duff's counsel, Lloyd testified that while the Ehrman Agency operated independently, it had operated as a personal producing agency. (F6-F9). Its dealings with independent agents and brokers were restricted, by the terms of its agreement with Crown, to only three or four brokers with whom Jules Ehrman had a family relation or a long term business association. The Ehrman Agency was not a brokerage general agency; it was only after the Ehrman Agency joined with a new corporate entity, EROC, that Ehrman was permitted to search for independent agents or brokers. (F9). Lloyd further testified that even if Ehrman had contacted brokers other than the few brokers to which he was restricted, any business which resulted from such efforts would have been transferred to the brokerage general agent for the Pittsburgh area, Malley-Duff. (F9-F12). No evidence exists to contradict the fact that the Ehrman Agency was not a brokerage general agent but rather a personal producing agent. This uncontradicted testimony of a witness called by Malley-Duff is conclusive to establish the absence of competition between the Ehrman Agency and Malley-Duff.

Additionally, at the trial Malley-Duff offered into evidence Plaintiff's Exhibit 3446. This document consists of a cover letter from Lloyd to all Crown general agents and five pages of data on the sales levels and market penetration of the various Crown general agencies during 1977, the last year Malley-Duff was Crown's brokerage general agency in Pittsburgh.[3] The cover letter, dated June 21, 1978, which was sent shortly after the termination of Malley-Duff, stated that the national average for Crown general agencies in 1977 was .53% of the United States market for life insurance, and sets forth Crown's policy that the minimum target for each agency should be a penetration level of .5% of the market. Malley-Duff's level of market penetration of 1977 was far below this minimum target level. Malley-Duff had a market share of only .11% (H3). If Malley-Duff had had a market share of .5%, it would have sold $25,000,000 of insurance. That same page of this document indicates that the Pittsburgh Center Agency (Crown's internally used title for the Jules Ehrman Agency) was a personal producing agent, not a brokerage general agent with an assigned territory. (H3). Malley-Duff's own exhibit thus indicates that whereas Malley-Duff was a brokerage general agency, the Ehrman Agency was a personal producing agent, and that Malley-Duff's penetration of the Pittsburgh market was less than one-fourth of what it had to be to equal the average of all Crown's United States agencies.

Malley-Duff is also precluded from claiming that Lloyd had any ownership interest in Agency Holding. At

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3. The cover letter and excerpts of the data relating to Malley-Duff and Ehrman are included in Appendix H. Crown's internally used title for Malley-Duff was "Pittsburgh EE" as is shown on page H3.

the trial, Kerry Craig was called as a witness by Malley-Duff. While on the stand as part of Malley-Duff's case in chief, Craig testified that 100% of the stock of Agency Holding Corporation was to be owned by Craig (F1-F2). Likewise, Lloyd, who was also called as a witness by Malley-Duff, testified that there was no agreement that Lloyd was to receive an interest in Agency Holding (F12-F13). Lloyd further testified that he never had any financial interest in the Pittsburgh agency operated by Craig and was never promised any such interest. (F5; F3-F4). At a hearing on Malley-Duff's motion for sanctions, Craig, called by Malley-Duff as for cross-examination, testified to the same effect (G3-G11). Malley-Duff having called these witnesses during its case in chief, is bound by such testimony unless the testimony is contradicted. Malley-Duff offered no direct evidence to contradict this testimony.

REASONS FOR GRANTING THE WRIT

I. There is no plurality of actors to establish a violation of Section 1 of the Sherman Act when the alleged conspirators are an insurance company, its general agent (a corporation), and an officer of each of those corporations.

The Third Circuit's opinion here erroneously assumed that there was a plurality of parties sufficient to sustain a violation of Section 1 of the Sherman Act. This is in direct conflict with this Court's holding in *Copperweld Corp. v. Independent Tube Corp.*, __ U.S. __, 104 S. Ct. 2731 (1984) and the Tenth Circuit's decision in *Card v. National Life Insurance Co.*, 603 F.2d 828 (10th Cir. 1979).

At the trial of this case, Malley-Duff proceeded on the theory of a group boycott. Opinion, A11. To establish

an actionable violation of Section 1 of the Sherman Act, there must be sufficient plurality of actors. *Copperweld Corp. v. Independent Tube Corp.*, 104 S. Ct. 2731, 2741 (1984). In the instant case, there can be no plurality of actors because Crown, Lloyd, Agency Holding and Craig are all part of Crown's overall business structure. This Court made it clear in the *Copperweld* decision that there can be no concerted action, no conspiracy among the members of a single entity.

Additionally, "officers or employees of the same firm do not provide for the plurality of actors imperative for a Section 1 conspiracy. *Copperweld*, 104 S. Ct. at 2741. Thus, Lloyd as a vice-president of Crown was incapable of conspiring with Crown and Craig as president of Agency Holding was incapable of conspiring with Agency Holding.

Similarly, Agency Holding, Crown's general agent in Chicago and Cleveland, being part of Crown's overall business structure, was incapable of conspiring with Crown. As the court in *Card v. National Life Insurance Co.*, 603 F.2d 828 (10th Cir. 1979), held:

> [T]he General Agents Association, consisting as it did of general agents of National Life Insurance Company, was really a part of the National Life Insurance Company structure and they could not be regarded as conspirators. The same is true of the defendant Ryan and the defendant Leland. Ryan is a general agent for National Life Insurance Company and Leland is executive vice-president, so they cannot be effective conspirators either.

Id. at 834.

Accordingly, this Court should grant the present writ to resolve the conflict created by the Third Circuit's decision because it is contrary to the holdings of this

Court and of the Tenth Circuit on the question of whether there is a plurality of actors under Section 1 when the alleged conspirators are an insurance company, its general agent (a corporation) and an officer of each of those corporations.

II. An insurance company's termination of a general agency contract with one of its general agents cannot constitute a classic group boycott, even if the termination was in response to a request by the replaced agent's alleged competitor.

The Third Circuit in this case reversed the district court's grant of a directed verdict in favor of the defendants on the antitrust claims by holding there was a sufficient showing of the elements of a classic group boycott by Crown's termination of Malley-Duff as a general agent. This holding is contrary to a long line of cases of this Court and of other Circuits which have outlined the scope of classic group boycott violations.

In *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978), the District of Columbia Circuit defined the "classic group boycott" as:

> a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. Typically, the boycotting group combines to deprive would-be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates.

Id. at 1178 (footnote omitted).

Similarly, the Ninth Circuit in *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979), explained:

> In Sullivan, *Antitrust*, at 259 (1977), the author states: "If the *per se* rule respecting boycotts is to become coherent, we must recognize that it applies only where competitors engage together to inhibit others with whom they compete by depriving those others of elements needed in the competitive context." Here the concert of action was by a sole competitor and that competitor's parent company, and was in no way an agreement between competitors.

Id. at 387.

In the instant case there can be no "classic group boycott" to which the *per se* standard is applicable. Crown and Lloyd operated at a competitive level distinct from that of Craig and the companies with which Craig was associated. There is no "group" of competitors acting against Malley-Duff. Crown alone was in a position to deal with Malley-Duff. There was no concerted refusal to deal, and hence no boycott, as there were no other entities, other than Crown, which were capable of refusing to deal with Malley-Duff.

To constitute a concerted refusal to deal, there must be two or more entities, who are in a position to deal with the plaintiff, acting in concert in refusing to deal with the plaintiff. Such of the cases as do find that a boycott existed all involved two or more entities in a position to deal with the target joining in refusing to deal. Thus, in *United States v. General Motors Corp.*, 384 U.S. 127 (1966), all of the Chevrolet dealers in Los Angeles banded together in an agreement to refuse to sell to discount dealers. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), involved approximately a dozen manufacturers of sound equipment all agreeing to refuse to sell to the plaintiff, a discount store. *National Society of Professional Engineers v. United States*, 435 U.S. 679

(1978), involved an association with thousands of members acting in concert, as did *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). In *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978), three of the just four companies writing medical malpractice insurance in Rhode Island agreed with the fourth to refuse to deal with applicants for such insurance to enable the fourth to change its form of coverage from an "occurrence" to a "claims made" basis. The decision most often cited as illustrating an illegal boycott is *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941), which involved a concerted refusal, by 176 manufacturers of women's garments, to sell to retailers who bought from manufacturers pirating their original designs. In the case at issue, Crown was the only one of the alleged boycotters in a position to deal with Malley-Duff as a general agent. Thus, there was no, and could be no, concerted refusal to deal.

As was held in *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Co.*, 682 F.2d 660 (7th Cir. 1982), and the Third Circuit's opinion in *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093, 1094 (3d Cir. 1972), a single supplier or seller may cease to do business with one company and transfer his business to another and such a transfer is valid even if the successor may have solicited the transfer and even though the seller may have so agreed with the successor prior to seller's termination of the former distributor. Absent evidence of an intent to manipulate prices (and there is no such evidence in this case (see section III, *infra*,)) plaintiff must prove a reduction in competition. By replacing Malley-Duff with EROC as its general agent in Pittsburgh, Crown has merely substituted parties. Both before and after the termination of Malley-Duff there existed only one Crown brokerage general agent. The

Ehrman Agency, a personal production style agency, did not compete with Malley-Duff. Ehrman operated as a personal producing general agent and as such solicited directly from the ultimate policyholders; Malley-Duff, in contrast, was a brokerage general agent and solicited from brokers (F9). The two agencies operated on different planes. Malley-Duff failed to introduce sufficient evidence, even viewed in a light most favorable to it, to establish any reduction of competition as a result of the termination of Malley-Duff. In essence, the Third Circuit here, however, contrary to the holdings of the traditional group boycott cases, converted a group of alleged conspirators into a group of competitors.

Crown's decision to terminate Malley-Duff and the subsequent actions undertaken to implement that decision are absent any element of anticompetitive purpose or effect. This substitution of one business entity for another as general agent had no impact whatsoever on competition. The substitution of distributors, even at the behest of the successor entity, does not give rise to a *per se* violation under Section 1 of the Sherman Act. *Ark Dental Supply Co.*, 461 F.2d at 1094.

Where, as here, there is no group, there can be no group boycott. Crown alone dealt with Malley-Duff. Its decision to terminate Malley-Duff as its general agent was a vertical decision which, even if made at the urging of Craig, was a unilateral refusal to deal and not subject to the *per se* standard of liability.

Accordingly, the present writ should be granted because the Third Circuit's decision, contrary to the decisions of this Court and others, holds that a group boycott can exist where a single insurance company terminates its general agency contract with one of its general agents.

III. In the absence of a price control factor, there cannot be a *per se* violation when an insurance company terminates its general agent.

The Third Circuit's decision adopts for the first time the rule that a *per se* violation is established, even in the absence of a price control motivation,[4] when an insurance company terminates its general agent. This decision is in direct conflict with decisions of the District of Columbia, Second, Fourth, Seventh, Eighth and Ninth Circuits and with the clear implications of this Court's recent decision in *Monsanto Co. v. Spray-Rite Service Corp.*, __ U.S. __, 104 S. Ct. 1464, *reh'g denied*, 104 S. Ct. 2378 (1984).

To establish a violation of the antitrust laws, a party must demonstrate the existence of either an anticompetitive purpose or effect. *See Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 80 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). The concern of the antitrust laws is to protect the consumer interest in competition. *Reiter v. Sonotone Corp.*, 442 U.S. 330

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4. Because the Pennsylvania Insurance Department must approve premium rates and policy terms, there could be no competition as to the price or product here involved. As Respondent itself explained at the oral argument before the Third Circuit:

> There the agents who are involved cannot compete on the basis of price. We cannot vary the price of an insurance policy. It is regulated by State law. I can't charge less than Mr. Ehrman charges. I can't vary my price in response to what State Farm is putting out. Similarly we cannot vary the quality of our product. We're selling a policy that is approved by the State. There is no way that we can change the terms and conditions of that policy in response to competitive demands.

Transcript of Oral Argument, E2.

(1979); *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Co.*, 682 F.2d 660 (7th Cir. 1982).

To prove that a conspiracy or other form of agreement violates Section 1 of the Sherman Act, the plaintiff must show either that it falls in one of the categories of "per se" illegality or that it has an actual, or at least probable, anticompetitive effect. As the court in *Products Liability* recently stated:

> Agreements that are illegal per se are for the most part horizontal, that is, between competing sellers, which Crum & Forster and Paris are not. The former is an insurance underwriter, the latter an insurance agent. Their relationship is "vertical" —analogous to that between a manufacturer and his distributor. If multiple manufacturers or multiple distributors were involved, the agreement would have an admixture of the horizontal, as in *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404, 412-413 (6th Cir. 1982), but there is nothing of that sort here.

682 F.2d at 663.

In order to apply the *per se* categorization to a vertical relationship, as is involved in this case, two factors are crucial—horizontal impact and price control motivation. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979).

Because the Third Circuit's decision in this case eliminates price control motivation as a crucial factor to establishing a *per se* violation, that decision is in conflict with the decisions of six other Circuits and of this Court.

In *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Co.*, a case which as the Third Circuit noted involved "a fact situation similar to the

instant case," (Opinion, A13-A14) the Seventh Circuit Court of Appeals stated:

> *Vertical agreements are illegal per se only if their purpose is price fixing.* Thus, if Paris and Crum & Forster had conspired to exclude Getzoff in order to increase the price of insurance, then *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), ... would be authority for holding that the defendants had committed a per se violation of Section 1 of the Sherman Act by a form of vertical price fixing. But in the absence of any evidence of intent to raise prices—and there is no such evidence in this case —an agreement whereby a supplier of some good or service refuses, at the behest of one of his distributors, to deal with a competitor of that distributor is not illegal per se. To prevail in such a case the plaintiff must show that the refusal to deal is likely to reduce competition. *See, Oreck Corporation v. Whirlpool Corp.*, 579 F.2d 126, 133-34 (2d Cir. 1978) (*en banc*). So even if Paris had said to Crum & Forster, "it's Getzoff or me—you must choose between us", and Crum & Forster, knuckling under to the threat, had refused to appoint Getzoff as an insurance agent who would have competed with Paris, there would still be no violation of section 1 without some showing of adverse effect on competition.

Products Liability, 682 F.2d at 663 (emphasis added). The Seventh Circuit cited the Third Circuit's decision of *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979) for the very proposition—price control motivation is an essential factor—that the Third Circuit here cites *Cernuto* as rejecting. (Opinion, A13).

In *Cernuto*, plaintiff, a discount retailer, alleged that a supplier of kitchen cabinets and its sales representative

terminated plaintiff's supply contract at the urging of a competing retailer who complained about plaintiff's price competition. The Third Circuit emphasized *two* factors as absolutely crucial to its finding that these allegations established a *per se* violation, and used one of them—the price competition factor—to distinguish the *Cernuto* fact situation from two cases decided by other federal circuits. The *Cernuto* court admitted that the cases decided by the two other circuit courts suggested "a result contrary to the one we reach today." 595 F.2d at 169.

The factor that does exist in *Cernuto* and arguably in the instant case is the horizontal impact of the action taken by the supplier. The other "[e]qually important" factor, the one missing from the instant case, was that "the motivating factor in [the competing retailer's] efforts ... was ... price." 595 F.2d at 168. "By prevailing upon [its supplier] and [the supplier's representative] to terminate their contract with plaintiff, the competing retailer effectively eliminated the threatened competition and was able to maintain prices at its own preferred levels." *Id.* at 169.

The two cases from other federal circuits distinguished by the *Cernuto* court on the basis of the price control motivation factor were *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957) and *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (*en banc*), *cert. denied*, 439 U.S. 946 (1978).

The *Cernuto* court noted that, in both *Packard* and *Oreck*, just as arguably in the instant case, the horizontal impact factor was present.[5] But just as in the instant

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5. The Third Circuit in *Cernuto* stated:

There, the most successful car dealer in the Baltimore area threatened to cease selling the manufac-

case, the "[e]qually important" price control motivation factor was missing. "[I]n *Packard* the dealer was seeking not to fix prices, but to secure an exclusive franchise, a form of marketing strategy that is not without certain overall competitive advantages." 595 F.2d at 169-170. "[I]n *Oreck* there was no proof that Sears, the aggressive dealer, was inspired by price. In fact, Sears was selling Whirlpool vacuum cleaners at prices below those offered by plaintiff Oreck. Price control, then, was not the likely purpose of the Whirlpool-Sears agreement." 595 F.2d at 170.

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5. (Continued)
turer's automobiles unless the dealer's competitors were terminated and it was granted an exclusive right for the entire region .... Notwithstanding the horizontal impact of the dealer's action, the court reversed a jury verdict for plaintiff and refused to find an antitrust violation on the part of the manufacturer. A more recent case is *Oreck Corp. v. Whirlpool Corp.*, [ ] There, the Court of Appeals for the Second Circuit, sitting *en banc*, reversed a jury verdict for a plaintiff that had been deprived of its profitable trade in Whirlpool vacuum cleaners, as a result of an agreement between Whirlpool and Sears & Roebuck Co., the plaintiff's principal competitor. The court found the trial judge's instructions to the jury, which left open the possibility of finding a *per se* violation on such facts, to be erroneous, and remanded for a new trial—presumably under a rule of reason analysis.

Cernuto, Inc. v. United Cabinet Corp., 595 F.2d at 169 (footnote omitted). The rule of reason cannot apply to the instant case because as the district court explained "there is no evidence from which a jury could conclude that the defendants conspired with the purpose or effect of producing adverse, anticompetitive effects within relevant product and geographic markets." (C2, C4). Respondent itself conceded at oral argument before the Third Circuit that its case was primarily brought as a *per se* claim. Transcript of Oral Argument, E3.

The Third Circuit in this case held that a *per se* violation can be established merely by proving the horizontal impact factor, as opposed to proving a horizontal conspiracy, which is not present in this case. The Third Circuit's decision thus moves a giant step beyond and outside the holdings of the Seventh Circuit in *Products Liability* and its own precedent in *Cernuto* by eliminating completely one of the two factors *Cernuto* held was equally important to a finding of a *per se* violation. The decision ignores the *Cernuto* requirement that price control motivation be present *in addition to* horizontal impact. In its decision, the Third Circuit says that the plaintiff's "theory seems congruent with the observation in *Cernuto*" because plaintiff introduced evidence to prove "an agreement that produced an impact on the horizontal level." Opinion, A14. In fact, plaintiff's theory can never be congruent with *Cernuto* because price control motivation can never be present in the instant case.

If horizontal impact was the only factor required to apply the *per se* standard to vertical restraints, then every vertical restraint would be subject to *per se* scrutiny because horizontal impact is always going to be present when there are two or more people dealing on the same level of the competitive strata. Such a finding would completely undermine this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), where this Court held that all non-price vertical restraints are governed by the rule of reason standard.

The Third Circuit's decision here is also in direct conflict with decisions in the Fourth, Eighth and Ninth Circuits which have adopted the same approach and rule discussed in *Products Liability*. *See JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011 (9th Cir.), *cert. denied*, __ U.S. __, 104 S. Ct. 106 (1983);

Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207 (4th Cir.), *cert. denied*, __ U.S. __, 104 S. Ct. 242 (1983). The Ninth Circuit in *JBL Enterprises, Inc.*, relying on *Cernuto*, held in order for the plaintiff to establish a *per se* violation, it would have to allege that its competitor prevailed on the supplier to terminate plaintiff in order to eliminate actual or potential price competition. 698 F.2d at 1015. The Ninth Circuit affirmed the district court's grant of summary judgment and found that the *per se* rule was not applicable because the price factor was not present. 698 F.2d at 1015.

Similarly, the Fourth Circuit in *Bostick*, held that "a finding of a *per se* violation of Section 1 would result from a factual determination that the termination was in furtherance of competitors' desires to eliminate a price-cutting rival." 702 F.2d at 1215. Additionally, the Fourth Circuit explained:

> "[W]e think it is important to distinguish between a conspiracy among dealers and their supplying manufacturer for the purpose of retail price maintenance that would benefit the dealers and one involving the same parties but redounding primarily to the benefit of the manufacturer as a result of increased inter-brand competition. A restraint imposed by the former conspiracy would be horizontal in nature and *per se* illegal, while one imposed by the latter would be vertical and analyzed under the rule of reason."

Id. (quoting, Donald B. Rice Tire Corp. v. Michelin Tire Corp., 638 F.2d 15, 16 (4th Cir.), *cert. denied*, 454 U.S. 864 (1981)).[6]

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6. See also *Battle v. Lubrizol Corp.*, 673 F.2d 984, 989-90, 993 (8th Cir. 1982), *aff'd by an equally divided court, Battle v. Watson*, 712 F.2d 1238 (8th Cir. 1983) (*en banc*), *cert. denied*, __ U.S. __, 104 S. Ct. 1718 (1984),

Moreover, the Third Circuit's decision in this case is contrary to the clear implications in this Court's recent decision in *Monsanto Co. v. Spray-Rite Service Corp.*, __ U.S. __, 104 S. Ct. 1464, *reh'g denied*, __ U.S. __, 104 S. Ct. 2378 (1984) where this Court noted:

> The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. The former have been *per se* illegal since the early years of national antitrust enforcement. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404-409, 31 S. Ct. 376, 383-385, 55 L.Ed. 502 (1911). The latter are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549, 53 L.Ed.2d 568 (1977).

104 S. Ct. at 1469 (footnote omitted). As discussed above, the rule of reason test was not and could not be met in this case.

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6. (Continued)
wherein the Eighth Circuit noted that price and price competition were the key factors in *Cernuto* and went on to hold that because those very factors were present in the case before the court, a *per se* violation could be established; and *Roesch, Inc. v. Star Cooler Corp.*, 712 F.2d 1235, 1237 (8th Cir. 1983) (*en banc*), *cert. denied*, __ U.S. __, 104 S. Ct. 1707 (1984), where the court stated "a *per se* violation of section one would be established by proof that Star Cooler [the manufacturer] terminated its relationship with Roesch [the distributor] at the request of competing distributors and that the termination was in pursuit of a price related end."

Accordingly, this Court should grant the present writ to resolve the conflict created by the Third Circuit's decision because said decision is contrary to the holdings of the District of Columbia, Second, Fourth, Seventh, Eighth and Ninth Circuits and to the clear implications by this Court on the question of whether there can be a *per se* violation in an insurance company/general agent relationship in the absence of both the allegation of or proof of a price control factor.

IV. Transactions between an insurance company and its agents constitute the "business of insurance" under the McCarran-Ferguson Act.

The contention of Crown and Lloyd that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976), exempts them from antitrust liability was summarily dismissed by the Third Circuit in this case as follows:

> There is no merit to this contention. First, McCarran-Ferguson only exempts "the business of insurance," i.e., primarily the insurer-insured relationship, from the antitrust laws and not all the actions of insurers generally. *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). Second, the Act itself specifically excludes from the exemption "any agreement to boycott, coerce, or intimidate . . . ." 15 U.S.C. § 1013(b). Thus to the extent that Malley-Duff argues that appellees' conduct constituted a group boycott, appellees may not use McCarran-Ferguson as a shield.

Opinion, A20.

The Third Circuit below misread this Court's opinion in *Royal Drug*. There the majority (the Court divided 5 to 4) opinion discussed, 440 U.S. at 224 n.32, the question whether transactions between an insurer and its agents,

including independent agents, are the business of insurance, and concluded that such transactions, between insurers and agents, in the language of the dissenting opinion (*id.* at 245) might fall within the business of insurance. The dissenting opinion states:

> But the Court's attempt to limit its concession to horizontal transactions still conflicts with the legislative history. Compelling evidence is the fact that Congress actually rejected a proposed bill to limit the exemption to agreements between insurance companies. S. 12, 79th Cong., 1st Sess. (1945). See n. 3, *supra.* Moreover, vertical relationships between insurance companies and independent sales agencies were a subject of the indictment in *United States v. South-Eastern-Underwriters Assn.*, 322 U.S. 533, 535 (1944), were the object of discussion in the House, 90 Cong. Rec. 6538 (1944) (remarks of Cong. Celler), and were expressly included as part of the "business of insurance" in an early draft of the Act, *Id.* at A4406 (NAIC bill, 4(b)(5)). Again, the Court concedes that such transactions, between insurers and agents, might fall within the "business of insurance," despite the inconsistency with the Court's own theory. *Ante,* at 224-225, n. 32.

440 U.S. at 244-45. Both the majority opinion and the dissent were in agreement that the business of insurance includes both the underwriting and the spreading of risks. As contracts engaging agents to solicit the purchase of insurance is necessary for an insurance company to spread the risk and thus obtain an average selection of risks, it seems clear that an insurance company's contracts with its agents is part of the business of insurance.

The holding that *Royal Drug* prevents the application of the McCarran-Ferguson Act to the situation in the

case at bar is wrong, not only as a misconstruction of *Royal Drug*, but also because it is in conflict with decisions in the Fifth and Tenth Circuits.

Thus in *Card v. National Life Insurance Co.*, 603 F.2d 828 (10th Cir. 1979), the court held that the McCarran-Ferguson Act exemption applied in a case of an insurance company terminating its general agent's contract, and further held that the boycott exception to the McCarran-Ferguson Act's exemption from antitrust liability did not cover a case where the plaintiff claimed that the insurance company, an association of the insurance company's general agents, an individual general agent and an officer of the insurance company conspired to terminate the plaintiff's general agency contract. In the case at bar, the alleged co-conspirators were the insurance company (Crown Life), one of its officers (Lloyd), two of its general agents (Agency Holding Corporation of Illinois and Agency Holding Corporation of Ohio) and one of its individual general agents (Kerry P. Craig) also a stockholder and officer in the two Agency Holding eorporations.

Also, the Court of Appeals for the Fifth Circuit in the case of *Thompson v. New York Life Insurance Co.*, 644 F.2d 439 (5th Cir. 1981), held that provisions in an insurance agency contract precluding the agent from engaging in any other business or occupation for remuneration or profit without the written consent of the insurance company were exempt from antitrust liability as being part of the business of insurance under the provisions of the McCarran-Ferguson Act.

Accordingly, this Court should issue the present writ to review the question of whether transactions between an insurance company and its agents falls within the business of insurance under the McCarran-Ferguson Act.

CONCLUSION

A writ of certiorari should issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

August 1984

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No. 84-

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IN THE

Supreme Court of the United States

October Term, 1984

CROWN LIFE INSURANCE COMPANY, et al.,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5396, 83-5397,
83-5406, and 83-5427

MALLEY-DUFF & ASSOCIATES, INC., a corporation

vs.

CROWN LIFE INSURANCE COMPANY, a Corporation; AGENCY HOLDING CORPORATION, an Illinois Corporation; AGENCY HOLDING CORPORATION, an Ohio Corporation; CLARKE BURTON LLOYD, an individual; KERRY PATRICK CRAIG, an individual; and ELLIE M. GOLDSTEIN, an individual

Kerry Patrick Craig,

Appellant in Nos. 83-5396
and 83-5406

MALLEY-DUFF & ASSOCIATES, INC., a corporation

vs.

CROWN LIFE INSURANCE COMPANY, a Corporation; AGENCY HOLDING CORPORATION, an Illinois Corporation; AGENCY HOLDING CORPORATION, an Ohio Corporation; CLARKE BURTON LLOYD, an individual; KERRY PATRICK CRAIG, an individual; and ELLIE M. GOLDSTEIN, an individual

Crown Life Insurance Company and
Clarke Burton Lloyd,

Appellants in No. 83-5397

MALLEY-DUFF & ASSOCIATES, INC., a corporation

Appellant in No. 83-5427

vs.

CROWN LIFE INSURANCE COMPANY, a Corporation; AGENCY HOLDING CORPORATION, an Illinois Corporation; AGENCY HOLDING CORPORATION, an Ohio Corporation; CLARKE BURTON LLOYD, an individual; KERRY PATRICK CRAIG, an individual; and ELLIE M. GOLDSTEIN, an individual

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Appeal from the United States
District Court for the Western
District of Pennsylvania -- Pittsburgh

(D.C. Civil No. 78-0373)

Argued
March 5, 1984
Before: ALDISERT and HIGGINBOTHAM, *Circuit Judges*,
and LATCHUM, *District Judge*.*
(Filed May 7, 1984)

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* Honorable James L. Latchum, of the United States District Court for the District of Delaware, sitting by designation.

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OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

Two major questions are presented in these cross-appeals from a judgment entered on a jury verdict in favor of Malley-Duff & Associates, Inc. In the appeal at No. 83-5427, we must decide whether the trial court erred in directing an adverse verdict on Malley-Duff's antitrust claim that alleged a collective refusal to deal (boycott) in violation of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. In the appeals at Nos. 83-5396,

83-5397, and 83-5406, our primary task is to determine whether a new trial should be granted based on an inconsistency in the jury's verdict on state common law claims. Subsidiary issues involve several questions relating to admissibility and sufficiency of evidence and alleged errors in jury instructions.

Malley-Duff, a Pittsburgh-based general insurance agency, charged that Crown Life Insurance Company, a Canadian life insurance carrier; Clarke Lloyd, its former vice president in charge of United States general agencies; Kerry Craig, a former Crown employee; and Agency Holding Corporation, a multi-state general agency representing Crown Life in the United States, all participated in a *per se* group boycott against it in violation of § 1 of the Sherman Act. It also alleged that the defendants were liable under Pennsylvania common law because they conspired to tortiously interfere with Malley-Duff's Pittsburgh general agency contract with Crown Life and tortiously interfered with the contract. At the close of plaintiff's case, the district court directed a verdict for the defendants on the Sherman Act claim. After the close of all evidence, the jury found the defendants liable under one of the common law conspiracy charges and assessed damages of $900,000.00. All parties have appealed. We conclude that there was sufficient evidence on the antitrust claim to preclude a directed verdict and that the verdict form answers on the remaining state law claims were inconsistent. We, therefore, reverse the judgment of the district court and remand for a new trial.

I.

At trial, Malley-Duff presented a theory that Lloyd, while in charge of United States general agencies for Crown Life, masterminded a scheme to create the Agency Holding Company in conjunction with Craig to take over a number of Crown Life territories, and that,

inter alia, they intended to freeze Malley-Duff out of the Crown Life insurance business in Pittsburgh and replace it with an agency controlled by their interests. To evaluate the various contentions, it is necessary to set forth in some detail the evidence presented at trial. To the extent that the antitrust claim was terminated by a directed verdict, we invoke the familiar rule that we "consider the record as a whole and in the light most favorable to the non-moving party, drawing all reasonable inferences to support its contentions." *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 883 (3d Cir.) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 115 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)), *cert. denied*, 454 U.S. 893 (1981).

Malley-Duff presented direct and circumstantial evidence substantially as follows. In terms of insurance in force, Crown Life, located in Toronto, ranks in the top two percent of all life insurance companies operating in North America. At the time of the relevant events, Crown marketed its products in the United States through independent general agents, with agency contracts providing for commissions generally exceeding those offered by other life insurance companies.

The Malley-Duff agency was the oldest of seven Crown Life general agencies in Pennsylvania and represented Crown Life continuously and exclusively until its termination for a period of 23 years. The agency contract contained a 30-day termination clause. Malley-Duff did not have an exclusive franchise for Pittsburgh, Pennsylvania, but competed with the Jules Ehrman Agency, a brokerage and personal producing general agency, for the sale of Crown Life products in the area. Malley-Duff sold insurance through independent agents who, in turn, dealt with consumers. The Ehrman Agency engaged in both

personal production and brokerage sales. Notwithstanding this competition, Malley-Duff produced over $58,400,000 in business for Crown Life in the Pittsburgh area from 1967 to 1977.

Employed by Crown Life Insurance Company for over 30 years, Lloyd rose to the position of Senior Agency Vice-President for the United States. From at least 1976 until 1981, Crown Life vested Lloyd with complete and unfettered power to appoint and terminate general agents and to approve loans and financing for them.

Kerry Craig began with Crown in 1969 when he was only 21-years-old. For three years, he operated Xerox machines, but then was transferred to Lloyd's Agency Department where he served two years as a messenger until 1974. About a year later, Lloyd promoted the former Xerox operator and messenger to be a Supervisor of Agencies where he remained for two years until he left Crown Life to serve as the head of Agency Holding Corporation, which was formed in 1977 pursuant to Lloyd's instructions. Agency Holding became Crown Life's general agent in Chicago. Plaintiff contended that Lloyd and Craig controlled Agency Holding and used it to own and control general agencies in various parts of the United States, including Pittsburgh.

The creation of Agency Holding followed an interesting scenario. In October 1976, Crown Life's general agent in Chicago died. Lloyd, responsible for finding a replacement, revealed a plan to a friend, Dennis Cunningham, whose aid he attempted to enlist. Lloyd divulged that he was forming a "mega general agency holding corporation." App. at 1505a-06a. Beginning in Chicago, Cleveland, Pittsburgh and Toledo, this mega general agency holding corporation was designed to control Crown Life's general agencies throughout the eastern United

States. Plaintiff contended that the plan called for Craig and Robert Oglevee to join Lloyd in the operation, and Lloyd extended an invitation to Cunningham who declined to join.

Lloyd engaged Bruce Pennamped, an attorney in Indianapolis, Indiana, to incorporate Agency Holding Corporation in Illinois. Plaintiff contended that Pennamped was a nominee for Lloyd and Craig and that he was to front for Agency Holding until Craig, a Canadian national, received immigration permission to be employed in the United States. An indemnity agreement dated February 28, 1977, between the attorney and Crown sets forth Pennamped's duties more fully. Lloyd hired him to "assist in the organization, management, operation and financing of certain of [Crown Life's] general agencies located, or to be located, in Chicago, Illinois; Cleveland, Ohio; and, Pittsburg [sic], Pennsylvania . . . ." App. at 2616a; Supp. App. at 635a-36a. Pursuant to Lloyd's instructions, Pennamped made arrangements in January 1977 for Agency Holding to be qualified to do business in Ohio and Pennsylvania.

On February 11, 1977, Lloyd and Craig met with Chicago insurance executive Ralph Wood and offered Wood a position with Agency Holding. Lloyd explained that Agency Holding would be the new Chicago general agent and that it would control ten or twelve territories throughout the east, including Cleveland and Pittsburgh. Four or five vice-presidents were to be appointed and were to split 20 percent of the Agency Holding stock. Lloyd refused to divulge the identity of the 80 percent shareholder, and Mr. Wood declined the offer.

In March 1977, Crown Life, through Lloyd, appointed Agency Holding as its Chicago general agent. Pennamped continued to be the nominal head of Agency Holding although he seldom visited Chicago.

In early 1977, Lloyd terminated Crown Life's general agent in Cleveland, and awarded a new general agency for Cleveland to the newly formed Agency Holding Corporation of Cleveland, Ohio. Oglevee was the president of Agency Holding-Ohio, but Craig, still employed by Crown Life, was the majority stockholder, although there was evidence that he contributed no capital for his majority interest. Ed Horning was employed as manager and Lloyd promised him (but never delivered) 40 percent of the stock, while 20 percent was to be held by "silent partners." Supp. App. at 709a-10a. Plaintiff produced testimony that neither Craig nor Oglevee ever made a real business decision affecting any agency without first consulting Lloyd.

On July 12, 1977, the Immigration and Naturalization Service granted Craig permission to work in this country. Three days later, Craig resigned from Crown Life effective September 1, 1977 and became the company's general agent in Chicago and Cleveland. He was just three years away from his position as messenger and Xerox operator at Crown Life.

Lloyd and Craig traveled to Pittsburgh in August 1977 and met with the principals of Malley-Duff. At that meeting, Lloyd professed dissatisfaction with Malley-Duff's production, which had exceeded $5,000,000 in 1976. He delivered an ultimatum: Malley-Duff would be terminated unless it met a production quota; moreover, Crown Life was either going to establish a new general agent in Pittsburgh or to expand the Ehrman Agency.

The quota Lloyd imposed upon plaintiff in August 1977 required Malley-Duff to produce $7,500,000 of business by December 31, 1977, the year then in progress. Less than four months remained in the appropriate business year when plaintiff learned that it had to produce 50 percent more of its business than it did the entire preceding year.

Evidence disclosed that Malley-Duff had never had a quota before, that Crown Life had never imposed a yearly quota upon any agency over nine months into the year to which it applied, and that Crown Life had never terminated a general agent producing more than $5,000,000 in business. Crown Life's internal documents disclose that 78 percent of Crown Life's United States general agencies did not produce $7,500,000 in 1977. Malley-Duff's 1977 production had placed it in the top third of all of Crown Life's 1977 general agents in the United States. Moreover, Malley-Duff was told that it had to produce $10 million in 1978, $15 million in 1979, and $20 million in 1980, an increase of 300 percent in four years.

Lloyd admitted that he did not expect Malley-Duff to meet the quota. App. at 1661a. In August 1977, Oglevee told another general agent that he and Craig would take over Malley-Duff when it was terminated. He and Craig also agreed that their Pittsburgh venture would be more profitable if Malley-Duff were eliminated. Lloyd, Craig and Oglevee met with Mr. Ehrman in December 1977 to negotiate the acquisition of the Ehrman Agency.

Although Malley-Duff's 1977 production exceeded that of 1976, it fell short of the quota. On January 11, 1978, Crown Life mailed plaintiff a formal 30-day termination notice and, on February 13, 1978, Malley-Duff's business was transferred to the Ehrman Agency. Craig and Oglevee signed the formal purchase agreement for the Ehrman Agency and named the new agency Ehrman, Ratini, Oglevee & Craig (EROC), although Ehrman and Ratini were not owners. Craig and Oglevee and, according to plaintiff, also Lloyd, then had Crown Life's sole remaining franchise in Pittsburgh.

Direct evidence as to the true ownership of Agency Holding was not forthcoming at the trial, although there were permissible inferences that could have been

drawn by the jury. At the time Craig was appointed general agent for Chicago, he admitted to one of Crown Life's officers that he owned only "part" of the holding company. He later admitted to another that he owned 20 percent of Agency Holding and refused to identify the majority owner. Crown Life investigated the matter but was not able to determine the real owner of Agency Holding. Lloyd refused to disclose the information to Crown Life's other senior officers, claiming the matter was confidential.

The evidence showed that Lloyd had control over the granting and withholding of loans and advances from Crown Life to general agents in the United States. As soon as Agency Holding obtained a Crown Life franchise, Lloyd authorized large loans and advances for that agency that were unlike any Crown financing before or since. Crown Life funneled between $5,000,000 to $8,000,000 to Agency Holding. Lloyd left Crown Life in October 1981 and moved into Craig's Chicago apartment and took over Craig's office at Agency Holding. Lloyd then assumed control over and management of Agency Holding.

The present litigation followed these events. Malley-Duff charged that defendants conspired in violation of § 1 of the Sherman Act, 15 U.S.C. § 1.[1] It further charged that defendants were liable under Pennsylvania law for tortious interference with the Malley-Duff/Crown Life general agency contract and for conspiring to tortiously interfere with that contract. Directing a verdict on the antitrust claim at the close of plaintiff's case, the district court allowed the Pennsylvania common law claims to go to the jury. The

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1. Malley-Duff also alleged violations of § 2 of the Sherman Act and § 7 of the Clayton Act. Because Malley-Duff has not appealed the adverse directed verdict as to these counts, we do not address them here.

jury returned a $900,000.00 verdict for Malley-Duff on the conspiracy claim but concluded there was no tortious interference. Malley-Duff appeals from the adverse ruling on the antitrust claim and defendants appeal, attacking, *inter alia*, the jury verdict.

II.

We turn first to Malley-Duff's contention that the district court erred in adversely directing a verdict on its antitrust claim. Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Courts have narrowed the apparent scope of § 1 and have concluded that it precludes only those contracts or combinations that "unreasonably" restrain competition. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). Generally, a "rule of reason" analysis is employed to determine whether § 1 has been violated. Under this analysis, a plaintiff must show anticompetitive effect in the relevant product and geographic markets. *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). The Supreme Court has stated, however, that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific*, 356 U.S. at 5. Activities that have been treated as *per se* illegalities are price fixing, resale price maintenance, group boycotts, tying arrangements, and certain types of reciprocal dealing. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 166 (3d Cir. 1979) (citing cases).

Malley-Duff proceeded at trial under a group

boycott theory. In directing the verdict, the district court held that there was no evidence from which a jury could conclude that defendants had violated Sherman § 1 under either a "rule of reason" analysis or a *per se* violation theory. App. at 30a.

A.

The district court determined that no antitrust offense could be established without proof that the alleged anticompetitive conduct adversely affected consumers. App. at 27a-30a. The court relied on *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Co.*, 682 F.2d 660 (7th Cir. 1982), and concluded that the claim had to fail because antitrust laws are designed to protect consumers and determined that "[t]hough Ehrman and Malley-Duff may have competed with each other, it was not competition which would affect the consumer." App. at 30a. It is settled, however, that when a party is proceeding on the basis of a *per se* violation, "it [is] not for the courts to decide whether in an individual case [public] injury had actually occurred." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959). The district court clearly erred in focusing on impact on consumers in determining there was no *per se* violation. We have previously emphasized that a group boycott, a *per se* violation, is made out where there is concerted action with "a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both." *De Filippo v. Ford Motor Co.*, 516 F.2d 1313, 1318 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975).

We also note that to the extent the district court further relied on *Products Liability* in making its determination that a *per se* violation was not established, its reliance was misplaced. *Products Liability* involved a fact situation similar to the instant

case. There, an insurance broker alleged that an insurance company and agency conspired to exclude it from the product liability insurance business. 682 F.2d at 662. In determining whether a § 1 violation had been made out, the Seventh Circuit, speaking through Judge Posner, noted that "[t]o prove that a conspiracy or other form of agreement violates section 1 of the Sherman Act, the plaintiff must show *either* that it falls in one of the categories of 'per se' illegality *or* that it has an actual or at least probable anticompetitive effect." *Id.* at 663 (emphasis added). We have no quarrel with this. The court then noted that illegal *per se* agreements are for the most part horizontal and that vertical agreements are illegal *per se* only if their purpose is price fixing. *Id.* It concluded that the alleged agreement was vertical, and hence a *per se* violation could not be shown because there were no allegations of price fixing. It is at this step in the Seventh Circuit's reasoning that we part company.

In *Cernuto*, this court, through Judge Adams, observed that

> if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level.

595 F.2d 164, 168 (3d Cir. 1979). In the case before us, Malley-Duff has alleged an agreement among insurance sellers -- Lloyd, Craig, and Agency Holding, all competitors of Malley-Duff in the insurance sales business -- who conspired among themselves, and indirectly assisted by Crown Life, to freeze their

competitive seller out of the Crown Life insurance market; an agreement that produced an impact on the horizontal level. Plaintiff's theory seems congruent with the observation in *Cernuto*. We conclude, therefore, that in light of our own precedent, the *Products Liability* characterization of such an agreement as a vertical restraint is not binding and does not foreclose inquiry as to whether defendants' alleged agreement may have constituted a *per se* violation where its principal impact was felt on the horizontal level. Hence, *Products Liability* does not defeat Malley-Duff's right to go to the jury on the theory of group boycott, which has long been regarded as a *per se* violation. *See United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

Because Crown, Agency Holding, Lloyd and Craig argue that other reasons may support the district court's conclusion that there was no *per se* violation, we now turn to ruling case law on group boycotts to evaluate the evidence in the light most favorable to Malley-Duff.

B.

The Supreme Court has recently reminded us that

> there is the basic distinction between concerted and independent action -- a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination . . . or conspiracy" between the manufacturer and other distributors in order to establish a violation. 15 U.S.C. § 1. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

Monsanto Co. v. Spray-Rite Service Corp., ——— U.S. ——— (52 U.S.L.W. 4341, 4343, March 20, 1984) (citations omitted). In seeking affirmance of the directed verdict, appellees argue that there was insufficient evidence of concerted action here, that Crown Life had a right to refuse to deal with Malley-Duff, and that it terminated the agency as a result of an independent marketing decision. They argue that Crown Life had the power to change agents in Pittsburgh without subjecting any of the appellees to antitrust law violations. We understand this argument completely. Previous decisions of this court have carefully made the distinction, emphasized by the Supreme Court in *Monsanto*, that a termination decision prompted by concerted action is different than one emanating from independent action. *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093, 1094 (3d Cir. 1972). We understand appellees' argument that there must be "something more" than simply a unilateral termination before it is considered illegal. More ingredients must be added to the factual mix before the termination goes beyond the pale of legality and becomes a prohibited act under antitrust law. We therefore must examine these additional ingredients.

"[W]here the refusal to deal is not unilateral but rather is prompted by an understanding with other parties, an antitrust violation may be found, either by application of a *per se* rule or through a 'rule of reason' analysis." *Harold Friedman Inc. v. Thorofare Markets Inc.*, 587 F.2d 127, 142 (3d Cir. 1978) (footnotes omitted). Thus, it has been held where dealers induced General Motors to pressure recalcitrant automobile dealers not to deal with discounters, the Supreme Court noted that the fact that the restraints were induced by dealers seeking to choke off competitors at their level was sufficient to constitute a *per se* violation. *United States v. General Motors Corp.*, 384

U.S. 127 (1966). In comparison, this court found no such violation in another automobile dealership case that turned on different facts. In *De Filippo v. Ford Motor Co.*, 516 F.2d 1313 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975), we concluded that plaintiffs "were not deprived of the opportunity to become a Ford dealer or to purchase products on the same basis as other dealers. They were deprived simply of the benefits of a contract offered to them at special terms. Such a deprivation, even if the product of a concerted action, does not violate § 1 of the Sherman Act." 516 F.2d at 1320-21. As explained in *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council*, 670 F.2d 421, 430 (3d Cir.), *cert. denied*, ——— U.S. ———, 103 S. Ct. 229 (1982), this court "is among those that have attempted to limit the application of the *per se* rule to the 'classic' boycott." We repeat for the purpose of emphasis that a boycott is made out where there is concerted action with "a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both." *De Filippo v. Ford Motor Co.*, 516 F.2d 1313, 1318 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975). These cases teach, therefore, that although a unilateral decision to refuse to deal is not in and of itself a violation of the antitrust laws, if the decision is not purely unilateral but is the product of competitors working in concert with themselves or in conjunction with the company to exclude a person or a group from the market, the necessary elements of a boycott in the classical sense may be present, and hence a § 1 violation may be made out. As we see it, this was the plaintiff's theory advanced at trial.

C.

We now must decide if adequate factual elements were presented to the jury to support plaintiff's theory

of a classic group boycott. We embark on this analysis mindful of the Supreme Court's latest admonition that

> [t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Edward J. Sweeney & Sons*, [637 F.2d 105] at 111 [(3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)]; accord *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (CA2 1981) *cert. denied*, 459 U.S. 880 (1982); cf. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946) (Circumstances must reveal "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement").

Monsanto Company v. Spray-Rite Service Corp., ——— U.S. ——— (52 U.S.L.W. 4341, 4344, March 20, 1984) (footnote omitted).

Applying this standard to the facts of this case, we believe there was sufficient evidence for the jury to believe that Agency Holding, Craig, and Lloyd were competitors who were parties to concerted action among themselves and with Crown Life to terminate Malley-Duff. There was substantial direct evidence as well as circumstantial evidence to sustain plaintiff's theory.

We deem the following circumstances to be important. At relevant times, Lloyd represented not only himself, but Crown Life as well. Lloyd was the senior agency vice-president for the United States with complete power to appoint and terminate general

agents and to approve loans and financing for them. Many Crown Life decisions that directly related to Malley-Duff were made by Lloyd on behalf of his employer. This principal-agent relationship cannot be seriously controverted. Thus, under certain circumstances he acted for Crown Life; under others, he acted for himself. By February 28, 1977, Lloyd hired attorney Pennamped to organize Agency Holding Company, a mega general agency, and that Pennamped was to assist in organizing, managing, operating and financing general agencies to be located at various places in the United States, including Pittsburgh. There was sufficient evidence to support the inference that Lloyd had a financial interest in Agency Holding. There was circumstantial evidence suggesting that Craig, woefully inexperienced in the general agency field, was but a figurehead for Lloyd. Plaintiffs contended that Craig was not licensed to sell insurance in any state. Brief for appellant at 12 n.5. There was sufficient evidence for a jury to conclude that the imposition of quotas on Malley-Duff by Lloyd and Crown Life was a contrived device to terminate Malley-Duff: requiring the agency to increase a year's production by 50 percent within the short space of four months; imposing quotas of $10 million in 1978, $15 million in 1979, and $20 million in 1980 at a time when 78 percent of Crown Life's United States general agencies did not produce $7,500,000 in annual business and also at a time when Malley-Duff's 1977 production had placed it in the top third of these general agencies. There was testimony that before the year ended Oglevee said that he and Craig would take over Malley-Duff when it was terminated and that the Agency Holding venture would be more profitable if Malley-Duff were eliminated. Lloyd, Craig and Oglevee all participated in negotiations to acquire the Ehrman

Agency and when this came to fruition, Oglevee and Craig were named principals in the new agency. Finally, in his capacity as a senior vice-president at Crown Life, Lloyd caused from $5,000,000 to $8,000,000 to be funneled as loans from Crown Life to Agency Holding, the organization which he headed publicly after being discharged by Crown Life.

This direct and circumstantial evidence was more than sufficient to show "a conscious commitment to a common scheme designed to achieve an unlawful objective." The direct and circumstantial evidence support what this court has described as a classic group boycott: concerted action by competitors to exclude Malley-Duff from the market. This was not a simple unilateral action by a company to terminate a dealer as set forth in *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093, 1094 (3d Cir. 1972). Unlike *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), where there was no evidence that Texaco decided to terminate Sweeney because of complaints of competitors and no evidence of concerted action, here there was more than adequate evidence of an unlawful conspiracy to freeze out Malley-Duff in favor of Agency Holding. There was sufficient evidence for a jury to conclude that Lloyd and Craig conspired (1) between themselves, (2) with Agency Holding, and (3) given Lloyd's role in Crown Life, with both Agency Holding and Crown Life to the extent that Crown Life imposed artificial quotas on Malley-Duff and funneled millions of dollars into Agency Holding by way of loans. For example, had Crown Life imposed artificial quotas on Malley-Duff *without more*, this would have been a mere unilateral act. But those quotas were imposed by Crown Life through their senior vice-president Lloyd, and there was direct and circumstantial evidence that

they were imposed for Lloyd's ulterior cross-purpose to implement Lloyd's scheme with Craig and Agency Holding to freeze-out Malley-Duff from Crown Life. Moreover, Crown Life's funneling millions of dollars to Agency Holding cannot be evaluated *in vacuo*; it must be considered in conjunction with the same scheme. The result was a pincers movement: to mortally wound Malley-Duff and at the same time to replenish the coffers of Agency Holding, the mega-insurance agency that directly or indirectly was to replace Malley-Duff. The district court clearly erred in determining that there was insufficient evidence to go to the jury on the *per se* group boycott claim. [2]

D.

Appellees Crown Life and Lloyd argue that, in any event, they are immune from liability under § 1 of the Sherman Act because of the "insurance" exemption effected by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. There is no merit to this contention. First, McCarran-Ferguson only exempts "the business of insurance," i.e., primarily the insurer-insured relationship, from the antitrust laws and not all the actions of insurers generally. *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). Second, the Act itself specifically excludes from the exemption "any agreement to boycott, coerce, or intimidate . . . ." 15 U.S.C. § 1013(b). Thus to the extent that Malley-Duff argues that appellees' conduct constituted a group boycott, appellees may not use McCarran-Ferguson as a shield.

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2. In the view we take it is unnecessary to consider the alternative rule of reason theory advanced by plaintiff at trial. Moreover, from our treatment of the antitrust issue here, a conclusion must necessarily follow that there was sufficient evidence to go to the jury on the common law conspiracy issue, thus rejecting contentions presented by Crown Life and Lloyd.

III.

We now turn to the contentions presented by Crown Life, Agency Holding, Lloyd, and Craig (hereinafter appellee-cross appellants) in their cross-appeals that a new trial should be granted because of inconsistent answers in the verdict form covering the claims brought under Pennsylvania common law.[3] The reply of Malley-Duff is twofold. It argues that appellee-cross appellants have waived any inconsistent verdict objection. Alternatively, Malley-Duff argues that there is no inconsistency in the answers.

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3. The verdict form, with the jury's responses noted by an "X," provides in relevant part:

> 1. As to plaintiff's claim that all of the defendants other than Crown Life Insurance Company tortiously interfered with its contractual relationship with Crown Life Insurance Company, we, the jury, hereby find (make a separate finding as to each defendant listed):
>
> Agency Holding Corp. (of Illinois)-
> ___ liable; X not liable.
>
> Agency Holding Corp. (of Ohio)-__liable;
> X not liable.
>
> Clarke Burton Lloyd-__liable; X not liable.
>
> Kerry Patrick Craig-__liable; X not liable.
>
> 2. (A) As to plaintiff's claim that all of the defendants conspired to tortiously interfere with its contractual relationship with Crown Life Insurance Company, we, the jury, hereby find (make a separate finding as to each defendant listed):
>
> Crown Life Insurance Co.- X liable; __not liable.
>
> Agency Holding Corp. (of Illinois)-__liable; X not liable.
>
> Agency Holding Corp. (of Ohio)-__liable; X not liable.

We do not accept Malley-Duff's contention that appellee-cross appellants have waived the right to raise the inconsistent verdict issue. Malley-Duff argues that, based on the last sentence of Rule 49(b), F.R. Civ. P., the objection must be raised before the jury is discharged:

Clarke Burton Lloyd- X liable: __not liable.

Kerry Patrick Craig- X liable: __not liable.

(B) As to plaintiff's claim that all of the defendants conspired with the specific intent to inflict injury upon the plaintiff, we, the jury, hereby find (make a separate finding as to each defendant listed):

Crown Life Insurance Co.-__liable: X not liable.

Agency Holding Corp. (of Illinois)- ___ liable; X not liable.

Agency Holding Corp. (of Ohio)-__liable: X not liable.

Clarke Burton Lloyd-__liable: X not liable.

Kerry Patrick Craig-__liable: X not liable.

GO ON TO QUESTION NO. 3 ONLY IF YOU HAVE FOUND ONE OR MORE OF THE DEFENDANTS LIABLE. OTHERWISE, RETURN TO THE COURTROOM WITH YOUR VERDICT. (YOU MAY ENTER DAMAGES ONLY AGAINST THOSE DEFENDANTS WHOM YOU HAVE FOUND LIABLE IN PARAGRAPH 1 OR PARAGRAPH 2).

3. As to the claim(s) above for which we, the jury, have found in favor of the plaintiff, we hereby award:

(a) compensatory damages:

None_____

$ 900,000 .

App. at 638a-39a.

> When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

But Rule 49(b) specifically applies to a "General Verdict Accompanied by Answers to Interrogatories." Here, there was no general verdict. The "Verdict Form" submitted to the jury, *see supra* note 3, more properly is considered a verdict returned under Rule 49(a) "Special Verdicts," rather than under Rule 49(b) "General Verdict Accompanied by Answers to Interrogatories." Rule 49(a) contains no provision similar to that contained in Rule 49(b) stating that the "court shall return the jury for further consideration of its answers and verdict . . . ." Although it obviously would be preferable for counsel to cause an objection to be recorded on the basis of inconsistent answers in the Special Verdicts, no decision of this court has precluded appellate review of inconsistencies under a Rule 49(a) verdict in the absence of an objection before the jury was discharged. To the contrary, in *Halprin v. Mora*, 231 F.2d 197 (3d Cir. 1956), this court considered the inconsistencies of answers to special verdicts even though the court noted that "nowhere in the record furnished us do we find evidence that the plaintiff considered the answers confusing, or inconsistent or irreconcilable." 231 F.2d at 201.

We conclude that the answers to Questions 1, 2(A), and 2(B) may be considered inconsistent and accordingly agree with the appellee-cross appellants. We will vacate the $900,000 verdict in the state law claims and order a new trial. Because this issue may recur, we will explain in some detail our perception of

the inconsistencies and will offer suggestions how the problem may be avoided upon retrial.

A.

We begin by examining the anatomy of the Pennsylvania civil conspiracy law. Judge Sloviter has explained that the modern Pennsylvania tort of civil conspiracy is a fusion of two lines of cases. The tort may be made out upon proof of a "combination to do an unlawful act." This stems from an earlier conspiracy tort "in which the gist of the conspiracy was the tort itself." *Franklin Music Co. v. American Broadcasting Co.*, 616 F.2d 528, 549 (3d Cir. 1979) (Sloviter, J., concurring in part). The tort may also be made out upon proof of a "'combination to do a lawful act by unlawful means', [a concept that] stems from the cases holding that conspiring was itself an independent tort." *Id.* The gravamen of this second conspiracy formulation is the combination to do acts with intent to injure another. Id. at 551.

It was explained at oral argument that Question 2(A) was designed to cover the first formulation -- a combination to do an illegal act.[4] Thus, the jury was asked if the defendants "conspired to tortiously interfere with [plaintiff's] contractual relationship with Crown Life." It was also explained that Question 2(B) was designed to cover the second formulation -- a combination to do a lawful act by unlawful means.[5] Thus, the jury was asked if the defendants "conspired with the specific intent to inflict injury upon the plaintiff."

By its determination that defendants did not conspire "with the specific intent to inflict injury upon the plaintiff," it follows that the jury's conclusion that

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4. Oral argument transcript at 36.

5. *Id.*

defendant conspired to tortiously interfere with plaintiff's contract with Crown Life must have been based on the first conspiracy formulation -- an agreement to do an unlawful act. The jury, however, also determined, in its response to Question 1, that defendants had not "tortiously interfered with [plaintiff's] contractual relationship with Crown Life . . . ." Because there was proof of only one unlawful act, interference with a contractual relationship, *see* app. at 2428a, the jury's responses appear inconsistent. The answers may not be reconciled under an abandonment theory. There was no evidence adduced at trial that defendants either abandoned plans or accomplished a result different from that planned. Therefore, the jury's answers on the verdict form are inconsistent and irreconcilable. We turn to consider what may have caused the inconsistencies.

We believe it was Questions 2(A) and 2(B), relating to conspiracy, that led to jury confusion. Although the jury was given an instruction in the abstract explaining the difference under Pennsylvania law between the two types of conspiracies, there was no explanation of how these two esoteric concepts applied to the evidence that was presented. As appellate judges, we *now* know what was intended by Questions 2(A) and 2(B), but it required questioning at oral argument to clarify the matter. But unfortunately, at trial, the closing arguments of counsel did not even address the two different types of conspiracy and the jury instructions treated this very complex subject in legal terms somewhat lacking in perspicuity. [6]

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6. For example, the court instructed the jury:

> The other type of conspiracy is one involving the use of unlawful means, which is found whenever there is a combination of persons or entities to do acts with the intent to injure another.

We now know that counsel intended Question 2(B) to cover a theory that the termination of the Malley-Duff agency contract could have been a lawful act, but that the allegedly illegal combination to perform this act constituted the tort. This theory was expressed by asking the jury in 2(B) whether the "defendants conspired with the specific intent to inflict injury upon the plaintiff." But such a statement is woefully ambiguous. The jury could well have concluded that 2(B) was simply another way of expressing 2(A): that the defendants "conspired to tortiously interfere with [plaintiff's] contractual relationship with Crown Life." "Tortious interference" covers a multitude of sins, but at least it covers a situation where there is conduct "with the specific intent to inflict injury." We believe that it was not only possible, but also probable, that the jury did not understand the distinction between a conspiracy to tortiously interfere with plaintiff's contract and a conspiracy designed with a specific intent to inflict injury upon the plaintiff. Indeed, we are not confident that trained lawyers and judges who have studied the historical development of Pennsylvania civil conspiracy would have grasped the abstruse distinction without more explanation than was furnished the jury by counsel. The court charged that "[t]o prove a civil conspiracy under Pennsylvania law, the plaintiff must

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> Thus, a conspiracy which charges use of unlawful means does not require the use of illegal or tortious methods.
>
> What it does require is that the participants act in concert with the intent to injure another.
>
> In this case, the plaintiff claims that all of the defendants conspired against it with the intent to injure plaintiff.

App. at 2537a-38a.

show . . . that two or more persons . . . combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means." App. at 2537a. The court further charged:

> With respect to the plaintiff's claim that all of the defendants conspired to tortiously interfere with the plaintiff's contractual relationship with Crown, the plaintiff must prove, as to each defendant, that that defendant had the specific intent to interfere with plaintiff's contractual relationship.
>
> With respect to plaintiff's claim that all of the defendants conspired with the intent to injure it, the plaintiff must prove, as to each defendant, that that defendant had the specific intent to injure it.

Id. at 2541a. These instructions can be construed as applying the intent requirement to both conspiracy formulations. To the jury, the intent to do an unlawful act was, in all likelihood, synonymous with the intent to injure another. Devoid of a careful explanation, the two questions were too rich for the lay jury's blood. Based on plaintiff's direct and circumstantial evidence, its tort theory seemed simple and straightforward: the defendants conspired to inflict injury upon Malley-Duff by tortiously interfering with its contract with Crown Life.

Requested special interrogatories and requested jury instructions should be simple and straight forward. If the case proceeds or is defended on alternative conspiracy theories, it will fall upon counsel to explain carefully in language capable of lay comprehension what is intended by the various conspiracy theories. Once this is accomplished, there will be more effective direction in fashioning both the special verdict form and jury instructions. And this should minimize the possibility of a jury again returning inconsistent answers.

IV.

We now turn to other contentions presented by the appellant and appellee-cross appellants in their cross-appeals.

A.

First, appellee-cross appellants argue that the trial court erred by failing to instruct the jury on causation on the civil conspiracy issue. In reviewing jury instructions when error has been alleged, a new trial will be required only if the instructions, taken as a whole, give a misleading impression or inadequate understanding of the law and the issues to be resolved. *Bass v. International Brotherhood of Boilermakers*, 630 F.2d 1058, 1062 (5th Cir. 1980). Here, the court gave a causation instruction when it charged the jury on the tortious interference claim, app. at 2536a, and again when it discussed the awarding of damages in general, app. at 2543a. We conclude, therefore, that because these causation instructions were properly given, the need for a causal connection was made sufficiently plain to the jury so as not to render the overall instructions misleading or inadequate.

Next, we are satisfied with the court's exercise of discretion in refusing to admit evidence on how Herbert Sachs, now deceased, a former attorney of Craig, caused a bizarre investigation of the district judge originally assigned to this case. There is no question that Sachs's efforts were irresponsible, totally unjustified, and tantamount to sheer intimidation of a federal judge. Malley-Duff sought to introduce this evidence for punitive damages purposes and assigns the court's refusal to admit it as error. We find no abuse of discretion in refusing to admit this evidence on the ground that it would introduce a collateral matter that seems to implicate the attorney more than the litigant.

A related phase of this same problem involved

evidence introduced that the Chicago office of Agency Holding purchased a paper shredder after the complaint was filed in this case. The trial judge instructed the jury that if it found that evidence had been intentionally destroyed, it could infer that the evidence would have been favorable to plaintiff. In explanation of the paper shredding, Craig unsuccessfully sought to introduce statements made by Sachs to Craig as to why he had embarked on his ill-fated mission and assigns as error the court's refusal to admit it. We hold that the court did not abuse its discretion in refusing to admit any evidence of the Sachs escapade. Had Craig been successful in having a partial account admitted, Malley-Duff would have been entitled to introduce the entire sordid tale of Sachs's machinations, a tale collateral to the main litigation.

B.

All appellee-cross appellants argue that the evidence did not support the damages awarded to Malley-Duff. Specifically, the main thrust of their argument is that the method of valuation and evidence introduced by Malley-Duff was speculative and incapable of sustaining a damage award.[7] We disagree.

Generally, when the loss of business is alleged to be caused by the wrongful acts of another, damages are measured by one of two alternative methods: (1) the going concern value; or (2) lost future profits. *Arnott v. American Oil Co.*, 609 F.2d 873, 887 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980); *Lehrman v. Gulf Oil*

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7. Appellee-cross appellants also argue that Malley-Duff failed to establish the fact of damage. In view of our disposition of this case, we do not reach this issue. We note, however, that to the extent Malley-Duff shows, on remand, that loss of its business was caused by the unlawful acts of defendants, the fact of damage is established.

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Corp., 500 F.2d 659, 663-64 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). In the instant case, plaintiff opted to establish the going concern value. That value is the price a willing buyer would pay and a willing seller would accept in a free marketplace for the business in question. *Albrecht v. Herald Co.*, 452 F.2d 124, 131 (8th Cir. 1971); Rulon, *Proof of Damages for Terminated or Precluded Plaintiffs*, 49 Antitrust L.J. 153, 154-55 (1980). Damages are measured as the difference between that price before and after the termination. *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 109 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976).

To establish the going concern value, plaintiff applied a multiplier to the "Linton value" of the agency. The Linton value, an industry formula for determining the present value of a life insurance agency by reference to its vested renewal income, is capitalized through the use of the multiplier. The result of the formula is considered a reasonable approximation of what a willing buyer would pay and a willing seller would accept for the business.

Appellee-cross appellants challenge the use of the Linton value formula, and contend that Malley and Duff, partners in the Malley-Duff agency, were incompetent to present the data necessaary to make the calculation. We find no error. "[W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Ashcraft v. C. G. Hussey & Co.*, 359 Pa. 129, 132-33, 58 A.2d 170, 172 (1948). Moreover, the proof may be indirect and may include estimates based upon assumptions. It is only necessary that the assumptions rest on adequate data. *Lehrman*

v. Gulf Oil Co., 500 F.2d 659, 668 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *see also William Goldman Theatres, Inc. v. Loew's, Inc.*, 69 F. Supp. 103 (E.D. Pa. 1946), *aff'd per curiam*, 164 F.2d 1021 (3d Cir.), *cert. denied*, 334 U.S. 811 (1948). The "law only requires that a reasonable quantity of information must be supplied by plaintiff so that the jury may fairly estimate the amount of damages from the evidence." *Ashcraft v. C. G. Hussey & Co.*, 359 Pa. 129, 132-33, 58 A.2d 170, 172 (1948); *see also Pugh v. Holmes*, 486 Pa. 272, 297, 405 A.2d 897, 909-10 (1979).

We are satisfied that such was the case here. Malley and Duff's estimates of the going concern value were based upon the agency's Linton value during the period in question, and the formula used as a multiplier was shown to be an accepted industry practice. *Cf. Standard Oil Co. of California v. Moore*, 251 F.2d 188, 221 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958). Moreover, we have a neat sauce-for-the-goose scenario here. Notwithstanding appellees' objections to the use of the Linton value here, there was evidence that Craig and Lloyd used the same formula to establish price when they purchased other general agencies, such as Hartford (Linton x 2.5) and Newark (Linton x 3). App. at 1497a-99a, 1668-72a. Evidence was introduced that in the insurance industry, as in a number of industries, there are accepted formulas or rules of thumb that are employed as a means of valuing a business. Under such an accepted rule of thumb, a value is assigned by multiplying the annual earnings or sales of the business unit by some factor in order to determine its going concern value. *See, e.g.*, Rulon, *Proof of Damages for Terminated or Precluded Plaintiffs*, 49 Antitrust L.J. 153, 155 n.11 (1980). We conclude that the appellees were free to challenge the assumptions of the Linton value and multiplier and

note that they did so for the jury. That they were unsuccessful as a matter of fact does not mean that the formula was incorrect as a matter of law.

C.

Finally, appellee-cross appellants complain that the court improperly excluded evidence to show that Malley-Duff's production was very low prior to its termination, and that subsequent to its termination the new general agent, EROC, achieved much higher production levels. The purpose of this evidence was to show that the termination of Malley-Duff was the result of Crown Life's independent action, rather than concerted action by the several defendants. We find no error in excluding this evidence. First, Crown Life did not know at the time it terminated Malley-Duff what its successor's performance would be. Accordingly, such evidence was irrelevant to the proposition that Crown's actions were non-conspiratorial. Moreover, this evidence could be considered misleading because EROC was the sole surviving Crown Life agency in Pittsburgh. The proffered EROC figures incorporated the combined business of the old Ehrman office, the old Malley-Duff office and the new firm. It was a case of comparing EROC apples, as the single surviving agency, with oranges, the production of one of two previous agencies. EROC's sales were therefore not necessarily comparable to Malley-Duff sales taken alone. Additionally, there was the distinct possibility that such evidence would have opened the door to many collateral issues, *inter alia*, the means by which EROC obtained its new business, and what portion of EROC's business lapsed from the books by its first anniversary and actually constituted a loss to Crown Life.

V.

We have carefully considered all contentions presented by the appellant and cross-appellants. We will reverse the judgment of the district court and remand for a new trial consistent with the foregoing.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MALLEY-DUFF & ASSOCIATES, INC., a corporation, *Plaintiff,* v. CROWN LIFE INSURANCE COMPANY, a corporation, et al., *Defendants.*	Civil Action No. 78-373

ORDER

AND NOW, this 3rd day of May, 1983, IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for a New Trial on its Anitrust Claims and for Judgment Notwithstanding the Verdict and, in the Alternative, for a New Trial on Certain Law Claims filed in the above captioned matter on April 25, 1983, is DENIED;
2. the Motion of Defendants Crown Life Insurance Company and Clarke Burton Lloyd for Judgment Notwithstanding the Verdict and Alternatively for a New Trial filed in the above captioned matter on April 25, 1983, is DENIED; and
3. the Post Trial Motions of Defendant Kerry Patrick Craig filed in the above captioned matter on April 25, 1983, are DENIED.

ALAN N. BLOCH
United States District Judge

cc: H. WOODRUFF TURNER, Esquire
1500 Oliver Building, Pittsburgh, PA 15222.

ALEXANDER BLACK, Esquire
57th Floor, U.S. Steel Building, Pittsburgh, PA 15219.

JOHN H. BINGLER, JR., Esquire
One Riverfront Center, Pittsburgh, PA 15222.

APPENDIX C

TRANSCRIPT OF DISTRICT COURT'S GRANT OF PETITIONERS' MOTION FOR DIRECTED VERDICT

• • • • • • •

Corporation out of the Second Circuit. I think that's 291 F.2d 563. Sullivan's Treatise on antitrust at Section 49; I believe it also sets that forth.

So, we are talking here about a conspiracy to monopolize, and I think that we have sufficient evidence in the record that shows a conspiracy and sufficient evidence from which the jury may infer specific intent to monopolize. And I believe there is sufficient evidence in the record to show an overt act in furtherance of that conspiracy.

The Court: Okay. That's it?

Mr. Black: I should have added to my presentation, Your Honor, that as to the punitive damage counts, I submit that as far as Crown and Lloyd are concerned, there was no evidence offered that necessarily shows a showing of malice or other wrongful conduct to call for punitive damages.

Mr. Bingler: Your Honor, I might mention that there are a couple of other arguments relating to the use of the yardstick approach and to the speculative nature of the evidence of damages that are in our brief, and I just wanted to mention those.

I don't think it is necessary to argue them.

The Court: In count one, the plaintiff charged the defendants with a violation of Section 1 of the Sherman Act. In order to recover under this section, the plaintiff must prove that the defendants conspired with the purpose or effect of producing adverse, anti-competitive effects within relevant prod-

uct and geographic markets. See Martin v Glauser Dodge Company v Chrysler Corporation, 570 F.2d 72, at page 80, a Third Circuit case decided in 1977. No evidence has been presented which would support such a conclusion.

The plaintiff has consistently argued that the alleged collusion between defendants Crown and/or Lloyd and defendants Agency Holding and Craig to replace general agents in the various cities amounted to a boycott which would constitute a per se violation. As this Court noted in its written opinion on defendants' motion for summary judgment, the Third Circuit reviewed a similar business relationship in Cernuto, Inc. v United Cabinet Corporation, cited at 595 F.2d 164, a 1979 Third Circuit decision. Clearly, in Cernuto, the Third Circuit required that there be a showing of anti-competitive purpose or effect prior to determining that the alleged conduct constituted a per se violation of Section 1 of the Sherman Act.

There is no evidence from which a jury could conclude that Craig, Lloyd or the Agency Holding defendants could, would or did increase the price of an insurance policy sold to consumers. Though Crown certainly had the power to increase prices, there is no evidence from which a jury could conclude that Crown conspired with the other defendants with the intention of increasing its rates.

This Court recognizes that an antitrust violation could be found in conduct which stifles intrabrand competition. However, since there was no evidence of price competition between the Ehrman agency and Malley-Duff prior to the alleged takeover of

plaintiff's agency, the only form of intrabrand competition which could have existed and benefited the consumer might have been found either in the servicing of the policies or in an enhancement of benefits offered under a policy at the same price. No evidence was presented from which a jury could conclude that the quality of service or the quality of Crown life insurance policies could be or was affected by the takeover of the Malley-Duff agency.

The plaintiff has urged this Court to focus on the effect of the defendants' conduct on its competitor rather than the effect on competition. Thus, according to the plaintiff's theory, if a conspiracy were formed to eliminate existing Crown Life agencies so that the defendants could enter the market in a particular city without facing established competition, the elimination of the agency would constitute an antitrust violation in and of itself as an attempt to stifle competition before entry into the market. In essence, the plaintiff's position is that the intent to destroy a competitor is synonymous with an anticompetitive purpose. Though Klor's, Inc. v Broadway-Hale Stores, Incorporated, 359 U.S. 207, a 1959 case, has been cited for the proposition that driving a competitor out of business constitutes a violation of the Sherman Act in and of itself, the United States Supreme Court specifically noted that the Klor's case was not a case of a single trader refusing to deal with another, nor even of a manufacturer and dealer agreeing to an exclusive distributorship.

The Seventh Circuit has recently decided a case much more analogous to the instant one in Products

Liability Insurance Agency, Inc. v Crum & Forster Insurance Company, 682 F.2d 660, a 1982 Seventh Circuit case. The Seventh Circuit distinguished Klor's first on the ground that the relationship between an insurance carrier and one of its agents was more akin to that of a manufacturer and a dealer and, second, on the ground that even in Klor's the Court's ultimate concern was with the consumer. Though Ehrman and Malley-Duff may have competed with each other, it was not competition which would affect the consumer.

In summary, there is no evidence from which a jury could conclude that the defendants conspired with the purpose or effect of producing adverse, anticompetitive effects within relevant product and geographic markets; nor is there any evidence from which the jury could conclude that the alleged boycott constituted a per se violation of Section 1 of the Sherman Antitrust Act. As Judge Seitz so aptly put it in Sitkin Smelting and Refining Company v. FMC Corporation, 575 F.2d 440, at pages 447 through 448, a 1978 Third Circuit opinion:

> "Plaintiffs have not maintained their burden to show that the combination in any substantial way either did or could affect interstate commerce by controlling market prices, imposing undue limitations on competitive conditions, or unreasonably restricting competitive opportunity. These are the kinds of practices the Sherman Act was enacted to prohibit. Conduct not within the scope of the Act is not made into an antitrust violation by accompanying conduct which is reprehensible under some moral or eth-

ical standard or even illegal under some other law."

I, therefore, direct a verdict for all the defendants as to count one.

In count two, the plaintiff alleges that the defendants' conduct amounted to a violation of Section 2 of the Sherman Antitrust Act, in that the defendants attempted to monopolize and combined and conspired to monopolize the sale of insurance policies offered by Crown in commerce among the states in the area extending at least from the eastern coast of the United States to the western border of Illinois.

Section 2 of the Sherman Act provides that it is a violation for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations."

The Act does not define the term "monopolize", but the United States Supreme Court has stated that monopoly power consists of having "over 'any part of the trade or commerce among the several states,' a power of controlling prices or unreasonably restricting competition." See United States v DuPont and Company, 351 U.S. 377, at page 389, a 1956 case.

In a more abbreviated fashion, the United States Supreme Court described monopoly power as the power to control prices or exclude competition. That's at the same citation, U.S. v DuPont, at page 391.

As the United States Supreme Court stated in the DuPont case, "Illegal power must be appraised in terms of the competitive market for the product".

Here, there is no evidence of intrabrand competition which would affect the consumer, nor is there evidence that a monopoly of Crown insurance products would create an unreasonable restraint of trade in the market for insurance policies.

You should see also Columbia Metal Culvert Company, Incorporated v Kaiser Aluminum and Chemical Corporation, 579 F.2d 20, also at page 27 n. 11, that being a Third Circuit case decided in 1978, in which the Third Circuit distinguished Section 1 and Section 2 violations of the Sherman Act, noting that while "stifling intrabrand competition may violate Section 1, 'monopoly' over a given brand would clearly not run afoul of Section 2."

It is true that the United States Supreme Court in the DuPont case focused on the relevant market in the context of a monopolization charge and not an attempted monopolization or conspiracy to monopolize.

There is some authority that the exclusion of competitors in and of itself, without reference to any relevant market, suffices to prove a claim of attempted monopolization or conspiracy to monopolize.

In the instant case, though, there is no evidence of the exclusion of competitors within the meaning of the antitrust laws; the agencies excluded did not compete in a manner which would benefit the consumer or affect the relevant market. See Marrest v American Academy of Orthopedic Surgeons, 692 F.2d 1083, at page 1093. That's a 1982 Seventh Circuit case.

In addition, it appears that in this Circuit a showing of the relevant market is required to show attempted monopolization or conspiracy to monopolize. The Third Circuit affirmed the case of Venzie Corporation v United States Municipal Products Company, Incorporated, 382 F.Sup. 939, an Eastern District of Pennsylvania case decided in 1974 and affirmed at 521 F.2d 1309 by the Third Circuit in 1975, in which then District Judge Higginbotham analyzed the relevant product market to determine whether conspiracy to monopolize or attempt to monopolize had been established.

In short, there is no evidence from which a jury could conclude that the defendants had the power to monopolize the market for insurance products or that the defendants attempted monopolization of Crown life insurance products could have constituted a violation of Section 2 of the Sherman Act.

I, therefore, direct a verdict for all the defendants on count two.

In count three, the plaintiff charges that the conduct of the defendants amounted to a violation of Section 7 of the Clayton Act, in that the defendants acquired the whole or part of the assets of other corporations which had the effect of substantially lessening competition or tending to create a monopoly. In Brown Shoe Company vs the United States, 370 U.S. 294, a 1962 case, the United States Supreme Court analyzed Section 7 of the Clayton Act. Prior to delineating the elements of such a cause of action, the Court noted that "The legislative history illuminates congressional concern with the protection of competition, not competitors."

Furthermore, the Supreme Court held that "Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act." Given the two factors, the Court directs a verdict on count three for the same reasons provided as to counts one and two.

In count four, the plaintiff alleged that defendants other than Crown Life Insurance Company interfered with the plaintiff's contractual relationship with Crown Life Insurance Company.

The Court finds that there is sufficient evidence on this count to submit it to the jury for consideration. Therefore, the motion for a directed verdict as to count four is denied.

In count five, plaintiff claims that defendants' conduct constitutes a conspiracy and a concerted refusal to deal. To prove a civil conspiracy under Pennsylvania law, the plaintiff must show that two or more persons or entities combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. See Thompson Coal Company v Pike Coal Company, 412 Atlantic Second 466, a 1979-Pennsylvania case.

In Franklin Music v American Broadcasting Company, at 616 F.2d 528, at pages 546 through 552, the Third Circuit, in a 1979 case, with the opinion written by Judge Sloviter, writing for the majority on this particular issue, explained that the gravamen of a conspiracy charging the use of illegal means is "the combination to do acts with intent to injure another. The rationale for such a tort is that the combination itself provides the additional power to oppress individuals 'since there is a power in num-

bers, when acting in concert, to inflict injury, which does not reside in persons acting separately.' "

Thus, the Third Circuit concluded in the Franklin case that the use of unlawful means "does not require use of tortious methods but refers to the element of intent;" that is, the intent to injure another.

In the case before this Court, the plaintiff has presented sufficient evidence as to each defendant for a jury to conclude that a combination was formed to injure the plaintff. Therefore, the motion for a directed verdict as to count five is denied.

In count six, the plaintiff alleged that the defendants deprived it of its right to property and its use of possession of its business without plaintiff's consent and without lawful justification. The Court cannot conceive of any claim included in count six which would not also be encompassed by either the count four claim of tortious interference or the count seven claim of breach of contract.

Plaintiff has not presented this Court with any case authority for proceeding under count six as a separate legal theory. Therefore, the motion for a directed verdict in favor of defendants will be granted as to count six.

In count seven, the plaintiff charged that plaintiff's termination as a general agent resulted in a breach of contract—well, we have already ruled on that one.

In count eight, the plaintiff seeks punitive damages. Such damages are recoverable in a suit claiming tortious interference with a contractual relationship or civil conspiracy if the plaintiff can establish

outrageous conduct on the part of the defendants. There is sufficient evidence of outrageous conduct to submit the question of punitive damages to the jury. Therefore, the motion to direct a verdict as to count eight is denied.

Where that leaves us is, we have directed verdicts as to counts one, two, three, six and seven. The remaining counts will go to the jury.

Mr. Bingler: Your Honor, would it be possible to get a copy of what Your Honor was reading from for our convenience, rather than asking Mr. Powers to transcribe it?

The Court: Sure. Sure. We'll make copies.

Okay. Are we ready to go?

Mr. Borkovic: Your Honor, I just have one observation in your ruling on count one. I would urge to the Court to examine Judge Sloviter's opinion in the Franklin Music case, in which she defines anti-competitive purpose as an intent directed against the person in his status as a competitor, and that that would show an anti-competitive purpose.

To be honest with you, that was a—I believe that was her concurring opinion.

The Court: That's right—well, no. As to a civil conspiracy, she wrote the majority opinion. As to the rest of her opinion, it was a concurring opinion.

Mr. Borkovic: And at least according to her opinion in Franklin Music, actions directed against a competitor in a—a status quo competitor, evidences an anti-competitor purpose.

The Court: Okay. Good. We're ready to go. We'll make copies of this.

(Thereupon, court recessed in chambers at 11:23 o'clock a.m.)

(Thereupon, court reconvened in open court at 11:35 o'clock a.m.)

The Court: Mr. Black.

Mr. Black: Mr. Dowsett, would you take the witness stand?

ROBERT C. DOWSETT, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 83-5396, 83-5397, 83-5406 and 83-5427

Malley-Duff & Associates, Inc., etc.
v
Crown Life Insurance Co., etc.
Kerry Patrick Craig, *Appellant*,
Nos. 83-5396 & No. 83-5406
Crown Life Insurance Co. and Clarke Burton Lloyd,
Appellants, No. 83-5397
Malley-Duff & Associates, Inc., etc., *Appellant*,
No. 83-5427
(W.D. Pa. Civ. No. 78-0373)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*,* and LATCHUM, *District Judge*.**

The petition for rehearing filed by Crown Life Insurance Company and Clarke Burton Lloyd in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,
ALDISERT
Circuit Judge

DATED: June 4, 1984

* Judge Garth did not participate in the consideration of this matter.

** Honorable James L. Latchum, of the United States District Court for the District of Delaware, sitting by designation.

APPENDIX E

EXCERPTS FROM
TRANSCRIPT OF ORAL ARGUMENT
BEFORE
THIRD CIRCUIT COURT OF APPEALS
ON
MARCH 5, 1984

E1

Nos. 83-5396, 83-5397, 83-5406 & 83-5427

MALLEY-DUFF & ASSOCIATES, INC., ETC.

vs.

CROWN LIFE INSURANCE COMPANY, ETC.
Kerry Patrick Craig, Appellant in Nos. 83-5396 & 83-5406 Crown Life Insurance Co., et al, Appellants in Nos. 83-5397 Malley-Duff & Associates, Inc., etc. Appellant in No. 83-5427 Monday, March 5, 1984

Counsel for Appellant	Counsel for Appellees
H. WOODRUFF TURNER DAVID A. BORKOVIC (Malley-Duff & Associates)	JOHN H.BINGLER, JR. (Kerry Patrick Craig) ALEXANDER BLACK (Crown Life Insurance Company, et al.)

HAROLD SCHULMAN ASSOCIATES
REGISTERED PROFESSIONAL REPORTERS
1518 WALNUT STREET, 15TH FLOOR
PHILADELPHIA, PENNSYLVANIA 19102
546-5237—563-5237

* * * * * * *

significant things?

Mr. Borkovic: Your Honor, I'm sorry, Section Two?

The Court: Which would make it a Rule of Reason violation. What would be the three things which they did to make this an antitrust violation.

Mr. Borkovic: First, your Honor, they conspired. Second, the object of their conspiracy was to eliminate Malley-Duff so that they could enter the Pittsburgh market free of any competition with Malley and Duff. That is what we are complaining of.

The antitrust laws normally suffer vertical restraints because they tend to promote interbrand competition. That is not the case here. There the agents who are involved cannot compete on the basis of price. We cannot vary the price of an insurance policy. It is regulated by State law. I can't charge less than Mr. Ehrman charges. I can't vary my price in response to what State Farm is putting out. Similarly we cannot vary the quality of our product. We're selling a policy that is approved by the State. There is no way that we can change the terms and conditions of that policy in response to competitive demands.

The way these people compete is by service

* * * * * * *

would have been impossible for the jury to come back. It was impossible to send this to the jury on a per se violation under a group boycott. How do you respond to that?

Mr. Turner: Our view is precisely the opposite, that this is primarily brought to us as a per se claim.

The Court: How do you answer their argument that this is simply an attempt by a company to change the dealership?

Mr. Turner: Because this is, if we would look to *Cernuto* type of formulation, there's obviously a pernicious effect on competition, first of all.

The Court: What's so obvious?

Mr. Turner: The question is what redeeming virtue is it—what redeeming virtue is there in the elimination of a competitor to make way for a favored new entrant into the business? What virtue is there for the Crown Life? In most of these restriction cases, we look to the benefit to the manufacturer, Crown. So what benefit is there to competition . . .

The Court: But you have to prove the anti-competitive impact, don't you?

Mr. Turner: I believe there has been

APPENDIX F

EXCERPTS FROM THE TRIAL TRANSCRIPT IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

A. Yes.

Q. What happened to the other 400 shares?

A. I don't know whether this was actually issued on the 15th. I don't know whether Mr. Pennamped actually issued the 500 shares. All that I know is that when I spoke to Mr. Pennamped I told him that I was going to own a hundred percent of the corporation.

Q. When was that, after the letter of 19 July?

A. I don't remember exactly the date. But I remember Mr. Pennamped was in Chicago for a meeting and he still owned two percent of the shares. And I told him that since he wasn't going to be involved in the agency anymore that I really didn't see any point in him owning any shares.

Q. Well, how many shares do you now own?

A. One hundred.

Q. What happened to the other 400?

A. A hundred percent of the shares in the corporation.

Q. Well, Mr. Pennamped said he's got 500 shares, right, in his letter, Exhibit 1110?

A. Well, I can't speak for Mr. Pennamped. I can just tell you what stock I have in the corporation.

Q. Well, Mr. Pennamped was the man that formed the corporation, wasn't he?

A. Correct.

Q. And are you saying that there weren't 500 shares issued?

A. I don't believe so.

Q. Well, did you write to Mr. Pennamped and say, look, on July 19, you are writing and saying you are going to issue all this stock—hold the phone, you have already issued me my hundred percent. Why issue any more?

A. When I first moved to Chicago I was under the impression that the stock was issued, Mr. Pennamped had issued the stock in his name. He was going to retain two percent of the stock or two shares. And as I just explained to you before, I told him that the stock was going to be issued to me at a hundred percent.

Q. Now, you say you don't know whether this certificate here was issued on July 15, 1977 or not, is that what you say?

A. It may not have been. You know, attorneys often date things, you know—

Q. Well, who dated it?

A. That would be Mr. Pennamped.

Q. What's the date showing on the certificate?

A. July 15, 1977.

Q. And what's the date showing in the stub book that's pictured there?

A. This date here?

Q. On the left-hand side.

A. July 15, '77.

market and they were making great headway.

Q. Did Ferguson or Wainwright indicate that the company had told him to resign?

A. Mr. Ferguson certainly did not. And I am not really sure that Mr. Wainwright did, no, sir.

Q. Was it uncertain, in your mind, the way you answered, about what Mr. Wainwright told you?

A. It is uncertain, in my mind, as to what Mr. Wainwright said.

In response to your question, I don't recall that he said that the company told him to give them or didn't.

Q. So that there is a considerable shrinkage here now of what territory Agency Holding controls, right?

A. There is, yes, sir.

Q. And have you heard that once this case is disposed of, that the shrinkage will be total? Chicago will be no longer part of Agency Holding?

A. I have not heard that, sir, and I would be extremely disappointed if the company took that attitude.

Q. Have you discussed with Mr. Craig, before you left Agency Holding's employ, or consultancy, the bankruptcy of Agency Holding after this trial?

A. No, sir, I did not. I find that an incredible question.

Q. Well, isn't it true, sir, that you had an agreement prepared by the attorney O'Brien in Chicago,

whereby you were going to acquire, in 1983, a controlling interest in Agency Holding Corporation?

A. I did not, no sir.

Q. What kind of an agreement was it that Mr. O'Brien was preparing?

A. I don't think Mr. O'Brien was preparing any agreement; certainly not to my knowledge.

Q. You don't know of any agreement that was being prepared between Craig and/or Agency Holding, on the one hand, and Clarke Lloyd, on the other hand?

A. No, sir, I do not.

I had asked him to prepare an agreement where Mr. Craig would repay the money that he owed C. L. Trust. But, Mr. O'Brien never did anything about it.

Q. Did you ever go to see Mr. O'Brien about that agreement?

A. Did I ever go—which agreement is that, sir?

Q. The agreement that you asked him to draw about the money that you say is owed to C. L. Trust.

A. I went to see him. He wasn't there. And I called him on the telephone.

Q. Yes. What did he say?

A. He said that he was the attorney for Agency Holding, as well as C. L. Trust, and his interests were—he had known Kerry longer than he had known me, and he was going to work

* * * * * * *

LLOYD—Cross

Q. I think so. You had to do what?

A. We were caught. I had to—not "I". But, we had to, the Crown Life Insurance Company, had to go and see Jules Ehrman and ask him if he would temporarily take over the agency for us.

Q. The servicing of the business on the books?

A. Yes, sir. And would he service it and perform those situations.

So, for a while, I suppose two or three months, Jules Ehrman was the only agency that we had in the Pittsburgh market, and that certainly wasn't what we had in mind to develop the Pittsburgh market.

Q. Did you every have any interest in—any financial interest in the Pittsburgh agency?

A. No, sir, I did not.

Q. Did you ever have any promise of a financial interest?

A. No, sir, I did not.

Q. Any prospect of getting one?

A. No, sir, not—no sir.

Q. What about Chicago, did you have a financial interest in the Chicago agency?

A. No, sir, I did not.

Q. It was granted to Agency Holding Corporation—

A. I'm sorry. I didn't hear the question.

Q. I was finishing my question.

* * * * * * *

The Court: We'll put another—we'll cover it over. It can only have one number. We don't want to misidentify it on the record.

It's C-15. That's what it is.

By Mr. Black:

Q. That's the same one that I showed you earlier, is it?

A. Yes, sir.

Q. And that you identified as the agreement between Ehrman, Ratini, Oglevee and Craig, Incorporated, and Pittsburgh Center Corporation?

A. Yes, sir.

Q. In which you signed—agreed to be bound by—

A. Yes, sir.

Q. —on behalf of Crown Life Insurance Company, is that right?

A. That's right, yes, sir.

Q. Now, would you, Mr. Lloyd, look through that agreement and, having in mind your knowledge of how Mr. Ehrman operated prior to the execution of this agreement, tell us any differences between that method of operation and what this agreement calls for?

Mr. Turner: Objection, Your Honor. How Mr. Ehrman operated?

The Court: Well, I'm not sure I understand the question. Do you understand the question?

The Witness: Yes, sir. I think so.

The Court: What do you understand it to be?

The Witness: I understand the question to be that Mr. Ehrman, prior to this time, Your Honor, was limited only to two or three brokers. With this agreement he could then develop his own brokers. And, in other words, it gave him a bit of a widened market.

The Court: Is that what you are asking him—

Mr. Black: I am asking him—

The Court: —Mr. Ehrman's, the differences as far as Mr. Ehrman is personally concerned?

Mr. Black: Well, perhaps I wasn't clear on that. I meant his agency, which is known as the Pittsburgh Center Corporation.

The Court: You want this witness to do what?

Mr. Black: I asked that he look through the agreement and tell us about any particulars in which this agreement altered the operations of Pittsburgh Center Corporation, the way they existed prior to entering into this agreement.

The Court: In other words, what the new agency could do as compared to what the old agency could do, is that what you mean?

Mr. Black: Well, what Pittsburgh Center Corporation.

The Court: Didn't this create a new agency?

Mr. Black: No, I don't think so, Your Honor. I think this was an agreement between EROC and Pittsburgh Center Corporation.

The Court: Not buying the agency, is that it?

Mr. Black: No.

The Court: I see.

Mr. Black: Well, I will have to—I was going to ask the witness what the effect was—

The Court: As far as—did Mr. Ehrman's agency continue to assist after this agreement went into effect?

Mr. Black: Well, let me ask the witness.

The Witness: Mr. Ehrman's agency became a subpart of EROC. In other words, it was within the other corporation, Your Honor. And I suppose, in fact it disappeared into EROC.

The Court: Well, that's what my understanding was. So, that there was no separate operation of Ehrman's agency after this agreement took effect?

The Witness: Oh, yes, sir.

The Court: There was a separate agency still operating?

The Witness: Yes, sir.

The Court: Mr. Ehrman's agency?

The Witness: Yes, sir.

The Court: Okay. Well then, go ahead, answer the question. How did Mr. Ehrman's agency differ from before this agreement and afterwards? Just his agency.

The Witness: Yes, sir. His agency was part of the larger agency.

He brought with him Mr. Ratini, who was his former partner, his secretary, and he had a small casualty business that was also part of the agency.

What actually took place is, that Mr. Ehrman continued, along with Mr. Ratini, to develop their own clients and work with their own clients.

The Court: So, that's no different. You are being asked to point out the differences.

The Witness: Yes, sir. The difference was that his compensaton was changed from what he would earn on his own to what his business in his agency would earn, and that would be lumped in with EROC, and he would earn whatever EROC's rate of bonus was concerned, less a dollar.

He also was permitted, in his own unit, to search for independent agents and brokers, other than the three or four that he was restricted to.

He was then paid $4 a thousand for any business that his brokers produced through the—his unit.

He also had an agreement that should anything happen to him prior to—should he retire or should he die, either he or his wife, if that—would receive—can I refer to the document?

* * * * * * *

even though he worked for Rogal?

A. There was one ex-partner, whose name I can't recall —Linton, or something like that—that he had, and there might have been one other. I don't recall.

Q. Did that same restriction apply to Mr. Ratini? Did Mr. Ratini have any brokers he could work for?

A. None at all, no sir.

Q. Work with. Excuse me.

A. None at all, no, sir.

Q. What action would you, as the senior vice-president in charge of U.S. agencies, or would Crown, have taken with respect to Mr. Ehrman if he had contacted other brokers, other than the ones that the

three or four you have—the three or four you have named?

A. I can only cite facts. When he did, we would transfer the business and the broker to Malley-Duff.

Q. What if it was a broker that had not worked for either Malley-Duff or Ehrman before Mr. Ehrman made that, essentially, new brokerage contract?

A. Our agreement with Malley-Duff when Mr. Malley—I'm sorry—when Mr. Duff joined Mr. Malley was, that they would be the brokerage general agency in Pittsburgh. Any business that came as a result of Jules' encouragings in the brokerage market was transferred to the Malley-Duff.

Q. How did it happen that that agreement came about? You said "our agreement". I understood you to mean your agreement with Malley and Duff?

A. Yes, sir.

Q. How did that agreement come about when Malley-Duff, Incorporated was formed?

A. Again, I don't want to go back too far in history, but there was Mr. Kekich, Mr. Malley and Mr. Ehrman—

Mr. Turner: Objection. Non-responsive, Your Honor.

The Witness: I'm sorry.

The Court: The question is: How did that agreement come into effect?

Mr. Bingler: Yes. As of the time Malley-Duff was formed, it was Malley and Ehrman left in Pittsburgh?

A. Yes, sir.

Q. And then Crown encouraged Malley to get a partner, as I understand your testimony. Mr. Malley found Mr. Duff, and they formed Malley-Duff and Associates, Incorporated.

Now, my question is, simply: How did the agreement you mentioned that Mr. Ehrman would not be permitted to pursue any additional brokers than the few he had, how did that agreemet come about in your discussions with Mr. Malley and Mr. Duff?

A. Mr. Duff had brokerage experience and he did not want to come into a marketplace where he would be specializing and developing brokerage buiness and getting competition for his own business with somebody else. And we agreed that if Mr. Duff joined Mr. Malley and they formed Malley-Duff and pursued brokerage business, they would have the exclusive right to that business in western Pennsylvania.

Q. With the exception of the brokers Mr. Ehrman already had?

A. Yes. With the exception of agreed-upon brokers that Mr. Ehrman already had.

Q. So, Mr. Duff suggested that during the discussions of—

A. No, sir. I think that that was an agreement, both Mr. Duff and Mr. Malley.

Mr. Malley knew Mr. Ehrman and knew the brokerage business, and I would suggest that both Mr. Malley and Mr. Duff insisted on that agreement and—

Q. I take it, Crown was willing to accommodate that—

A. Yes, sir.

Q. —proposal?

A. Yes, sir. Enthusiasticlly.

Q. Did the existence of Crown's commitment to keep Mr. Malley restricted to the few—correction—Mr. Ehrman restricted to the few brokers he already had have any bearing on Mr. Duff's willingness to join with Mr. Malley to form Malley-Duff, Incorporated?

* * * * * * *

LLOYD—RE-DIRECT

A. No, sir. I did not.

Q. Didn't you just say this morning that you wanted a hundred percent of the stock in escrow?

A. First of all, C. L. Trust would have the escrow, and as long as the—as you well know, it is my understanding that in escrow everything stays, all the dividends and all the management remains with the person who has them until they default.

So, I was not asking for anything except to avoid default.

Q. There was an earlier agreement between you and Mr. Craig, wasn't there?

A. Obviously not, sir.

Q. There was an agreement back in 1976 and '77, when Craig first went down to Chicago, wasn't there, a written agreement that would give you an interest in Agency Holding and these other subsidiaries?

A. Absolutely not, sir.

Q. And isn't that exactly what was put in that shredding machine?

A. No, sir. And if there was such an agreement, sir, I would have had a copy, I being a party of the case.

And if you will remember, sir, I said that you could look at anything I had. You could come into my home, and I even wrote to the Department of Revenue in Ottawa to see if

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MALLEY-DUFF & ASSOCIATES, INC. a corporation, *Plaintiff* vs. CROWN LIFE INSURANCE COMPANY, a corporation; AGENCY HOLDING CORPORATION, an Illinois corporation; AGENCY HOLDING corporation, an Ohio corporation; CLARKE BURTON LLOYD, an individual; and KERRY PATRICK CRAIG, an individual. *Defendants*	Civil Action No. 78-373

Transcript of Hearing on various motions at Pittsburgh, Pennsylvania, commencing on Thursday, May 31, 1979.

Before: HUBERT I. TEITELBAUM, *United States District Judge.*

Appearances:

H. WOODRUFF, TURNER, and DAVID A. BORKOVIC, Kirkpatrick, Lockhart, Johnson & Hutchison, 1500 Oliver Building, Pittsburgh, Pennsylvania 15222, appearing in behalf of the Plaintiff.

ALEXANDER BLACK and JOSEPH J. BARNES, Buchanan, Ingersoll, Rodewald, Kyle & Buerger, 57th Floor, 600 Grant Street, Pittsburgh, Pennsylvania 15219, appearing in behalf of Crown Life Insurance Company, a

corporation, and Clarke Burton Lloyd, an individual, Defendants.

GERALD S. LESHER and KAREN M. BASKIN, Baskin & Sears, 10th Floor, Frick Building, Pittsburgh, Pennsylvania 15219, appearing in behalf of Agency Holding Corporation and Kerry Patrick Craig, Defendants.

ROBERT J. CINDRICH, United States Attorney, and J. ALLEN JOHNSON, First Assistant United States Attorney, 6th Floor United States Post Office & Courthouse, Pittsburgh, Pennsylvania 15219, appearing in behalf of the United States Department of Justice.

CRAIG—DIRECT

A. Within a period of time, I week; I'm not sure.

Mr. Turner: No further questions.

The Court: All right. Mr. Black, do you have any cross-examination?

Mr. Black: I do, yes, Your Honor.

The Court: Proceed.

Since he is your client, Mr. Lesher, we will save you for last.

Mr. Lesher: Thank you, Your Honor.

The Court: Because your examination will not really be cross-examination.

CROSS-EXAMINATION

By Mr. Black:

Q. Mr. Craig, who is the general agent for Crown now in the Pittsburgh area?

A. Ehrman, Ratini, Oglevee & Craig, Inc.

Q. And are you interested in that corporation?

A. Yes, sir.

Q. As a stockholder?

A. Yes, sir.

Q. Are there other stockholders?

A. Yes, sir.

Q. Is one of them Mr. Ehrman?

A. Yes, sir.

Q. Through questioning by Mr. Turner I believe you testified, or acceded to his questions which indicated that there had been two general agents in Pittsburgh prior to the termination of Malley-Duff, and one of them was Ehrman, and the other was Malley-Duff; is that correct?

A. Yes, sir.

Q. Were they competing with each other?

A. No.

Mr. Turner: Objection, Your Honor. There is no foundation for this.

By Mr. Black:

Q. Mr. Craig, if you don't know the answer to my question, I want you to say you don't know. If you do know the answer to may question, why that will obviate Mr. Turner's objection.

The Court: What you have to answer is whether you know to your personal knowledge the answer to that question.

The Witness: All right.

By Mr. Black:

Q. Now, what is the answer?

A. The answer was that there wasn't competition between the agencies.

Q. There was no competition?

A. No competition.

Q. How was that accomplished?

A. Mr. Ehrman was not allowed to broker business in Pittsburgh.

Q. Was there a territorial limitation on him?

A. No, there was no brokerage business period.

Q. With certain exceptions?

A. There may have been one or two, personal friends he did business with, but in general he was not allowed to promote, mail; he wasn't entitled to an advertising budget, promotional money, trips or anything.

Q. All right. Now, you were also asked about a quota having been imposed on Malley-Duff.

A. Yes, sir.

Q. By Mr. Lloyd.

A. Yes, sir.

Q. Do you know what quota was imposed?

A. I believe it was seven million. (A document is marked for identification.)

By Mr. Black:

Q. Mr. Craig, I show you this copy of a letter dated August 19, 1977, from—is that Mr. Lloyd's signature?

A. Yes, sir, it looks like it.

Q. It is addressed to Messrs. Tom Malley and Jim Duff. And I ask you to read that and then I am going to ask you if that refreshes your recollection about the amount of the quota?

A. Excuse me. The quota says seven-and-a-half million.

Q. Seven-and-a-half million of what?

A. Ordinarily individual health, net paid score in December, 1978.

Q. Now, at the time that this letter dated August 19, 1977, was given to Messrs. Malley and Duff, had they already obtained a portion of that quota?

A. I believe they had, something in the neighborhood of either two-and-a-half or three million.

Q. To the best of your knowledge and information?

A. Yes, sir.

Q. Now, do you know, Mr. Craig, what the comparable figure is for the first five months of this year of the EROC Agency?

Mr. Turner: I object to this, Your Honor. It seems wholly irrelevant to this case.

Mr. Black: I would have thought so too, Your Honor. I hadn't expected Mr. Turner would get into this subject, but he did.

Mr. Turner: How?

The Court: Overruled.

Mr. Black: He specifically—

The Court: I ruled for you. If you continue to argue, I reserve the right to change the ruling.

Mr. Black: I am sorry. I didn't hear you.

The Witness: Do you want my answer?

By Mr. Black:

Q. Yes.

A. I believe it exceeds, for the first five months of this year, I believe it exceeds the seven-and-a-half million.

Q. In other words, your agency, a new agency, in the first five months of this year had already exceeded the quota that was imposed on August 19, 1977, on Malley-Duff Agency, which had had a long history, and which quota at that point they had already attained one-third of; is that a fair statement of your testimony?

A. Yes, sir.

Q. Now, the other locations where you have an interest in a general agency for Crown, is it also true there that it is a corporation and not you an individual who is the general agent?

A. With one exception.

Q. Which one is that?

A. Peoria.

The Court: Are either of the two young ladies in the courtroom prospective witnesses?

(Both ladies answer in the negative.)

The Court: All right. Fine.

By Mr. Black:

Q. In Peoria are you individually the general agent?

A. Yes, sir.

Q. In all the other locations that you mentioned, it is a corporation; is that right?

A. Yes, sir.

Q. And are you the sole stockholder in any of those corporations?

A. In a number, yes.

Q. Which ones?

A. In Chicago I am; in Denver I am; in Minneapolis I am. I believe that is it.

Q. Now, in the others, there are other stockholders, I take it; is that right?

A. Yes, sir.

Q. In any of these locations, other than the Malley-Duff situation, was it an unfriendly change, so to speak?

A. No, I don't believe so.

Q. In other words, the Malley-Duff situation is the only one where it left the parties at odds?

A. In both Denver and in Minneapolis, the previous general agents are housed in our offices in Minneapolis. And he is a broker, the previous general agent in Denver, is a broker of ours.

Q. I take it the answer to my question is: Yes, Malley-Duff is the only situation that left the parties at odds?

A. Yes, sir.

Q. Now, did any—before you became general, or your company, you or your company became general agent in those locations, were any of them competing with each other?

A. In Minneapolis and Denver.

Q. Who were they competing with?

A. Minneapolis and Denver.

Q. You mean they were competing with each other?

A. With other Crown agents.

Q. Are they still?

A. Yes, we are.

Q. So there is no change in the competition by reason of your being—by your company becoming general agent; that is the point of my question?

A. No, there was not.

Q. It hasn't changed at all?

A. No, it has not changed.

Q. Now, in these locations where you do compete, you both offer the same price, don't you?

A. Yes, sir.

Q. In other words, Crown policies are what you are selling and what they are selling, and Crown—

Mr. Turner: Your Honor, excuse me. I object. This is far beyond my examination. This is getting into the substance.

The Court: I am going to sustain the objection. I think we are going right to the merit of the case now

and beyond the scope of the examination by Mr. Turner. You can depose the man if you want to and get this information.

Mr. Black: I am sorry. I apparently misunderstood the effect of the Court's ruling when I objected to Mr. Turner getting into this. May I put a brief offer of proof on the record.

The Court: Certainly.

APPENDIX H

CROWN
LIFE INSURANCE COMPANY
120 Bloor Street
Toronto, Canada M4W 183

TO: ALL GENERAL AGENTS IN THE
UNITED STATES AND PUERTO RICO

In 1977 the Crown Life obtained the highest percentage of market in Individual sales reaching a level of .53%.

This is, indeed, a strong commendation for our General Agency organization in the United States. It is an enviable record for a Company whose major marketing thrust began in the late 1950's to have already developed such a large segment of the U.S. market. The agencies that have achieved over .5% of the market are to be congratulated and are the benchmark for the future development of all agencies.

The minimum target for each agency should be the Company average of .5%. The chart also indicates the market population and the percentage of the State each market represents.

It is in everyone's interest I believe to press for a fair market share and it is one of the elements the company is using in evaluating the success of each agency.

For your interest, the County population surveys are based on the 1970 United States Census.

Kind personal regards.

Sincerely,

.....

Senior Agency Vice-President
For the United States

C.B.Lloyd:yj

June 21st, 1978
I./R.: 9937.00

Agency	Territory	Territorial Population	% of State Population	Net Paid 1977 Ordinary	Health	Group	Total	Market Share of Face Ordinary	Date of Original Contract with Current Mgmt.
Pittsburgh EE	Western Pa.	2,749,909	23.3%	5,137,405	102,661	278,089	5,518,155	.11	1-1-55
Pittsburg Ctr.	Personal Production		0%	6,041,393	45,235	124,000	6,210,628	.085	16-3-73

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CLERK

(2) (3)

Nos. 84-332/84-340

In The

Supreme Court of the United States

October Term, 1984

No. 84-332

AGENCY HOLDING CORPORATION, et al.,
Petitioners,

vs.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

No. 84-340

CROWN LIFE INSURANCE COMPANY, et al.,
Petitioners,

vs.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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H&B Equipment Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978) 5

JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc., 698 F.2d 1011 (9th Cir.) cert. denied, — U.S. — (1983) 8

Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) 10

Larry V. Muko, Inc. v. Southwest Pennsylvania Building and Construction Trades Council, 670 F.2d 421 (3d Cir.), cert. denied, 459 U.S. 916 (1982) 7

Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150, 1155 (7th Cir.) (en banc), cert. granted, 104 S. Ct. 3553 (1984) 7

Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984) 11

Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.) (en banc), cert. denied, 439 U.S. 946 (1978) 8

Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957) 8

Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Association, Inc., 672 F.2d 1280 (7th Cir. 1982) 7, 9

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for Western District of Pennsylvania which is not reported is found in the Appendix filed by Petitioner Agency Holding Corporation at pp. 35a-38a. The opinion of the United States Court of Appeals for the Third Circuit is reported at 734 F.2d 133 (1984).

JURISDICTION

Jurisdiction is sought to be invoked pursuant to the provisions of 28 U.S.C. 1254(1).

COUNTERSTATEMENT OF THE CASE

The complex proof which plaintiff-respondent Malley-Duff & Associates, Inc. (hereinafter "Malley-Duff") presented at trial in support of its antitrust claim is correctly summarized in the opinion of Judge Aldisert for the United States Court of Appeals for the Third Circuit. 734 F.2d at 136-139, 142-144.

The petitioners approach the facts in a widely divergent manner. Crown Life Insurance Company (Petition, pp. 3-9) recites its own version of the events, without even acknowledging Malley-Duff's proof. Agency Holding Company, on the other hand, purports to set forth Malley-Duff's contentions and, to some limited extent, does so.

As noted by the Court of Appeals, Mr. Clarke Lloyd operated on two levels, as a senior officer of Crown Life and as a participant in the Agency Holding group. Horizontally, together with Craig, the Agency Holding defendants, Ehrman, Ratini, Oglevee and others, he successfully eliminated competitors of his company, Agency Holding, and took over the distribution of Crown products in Illinois, Northern Ohio, Western Pennsylvania, Colorado, Arizona, New England and New Jersey. Since

most of these territories had one or more incumbent agents, he used his vertical power as Senior Vice President of Crown Life to terminate the incumbents, to appoint his own company as successor and to provide disparate "financial aid" from Crown Life which Lloyd and Craig then used for personal and business purposes.

Malley-Duff fell a victim of this scheme. Its Southwestern Pennsylvania territory was not exclusive. It competed, primarily on service,[1] with the Ehrman Agency, and Lloyd, Craig and the Agency Holding defendants planned to open a third office in Pittsburgh. Lloyd and Craig caused Crown to place a quota on Malley-Duff in August, 1977 covering the year ended December 10, 1977, i.e., with less than one-fourth of the year remaining. Agency Holding, Lloyd and Craig arranged to purchase the Ehrman Agency with the funds Lloyd got from Crown. When the quota was not met, Malley-Duff was terminated by Lloyd who then appointed his own company as successor and merged its business with the Ehrman Agency. Lloyd and Craig thus obtained sole possession of the market in the Pittsburgh territory. Lloyd carried out his activities with Craig and Agency Holding unbeknownst to Crown. However, Crown has never repudiated his behavior since it came to light.

---

[1]State law prohibited competition on the basis of price, and the primary method of competition was through the provision of services.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Copperweld was not considered by the Third Circuit and does not apply to these facts

Inspired by this Court's recent decision in *Copperweld Corp. v. Independent Tube Corp.*, 104 S. Ct. 2731 (1984), petitioners Crown Life and Lloyd argue that respondent alleged a mere bathtub conspiracy, an issue not raised in or decided by the Third Circuit. Petitioners' attempt to raise an issue before this Court that was never considered by either court below is, of course, untimely. But even if it had been timely raised, petitioner's analogy to *Copperweld* fails for three reasons.

First, defendants did not share an intracorporate relationship. Agency Holding was not a subsidiary of Crown Life. It was owned by Lloyd and Craig. Far from owning Agency Holding, Crown Life itself investigated and could not determine the identity of the majority shareholder. 734 F.2d at 139. It strains credulity to argue that a unity of economic interests existed since Crown Life did not know of Lloyd's activities with Craig and Agency Holding and many of Agency Holding's actions were contrary to Crown Life's interests. Crown Life, therefore, may not exclude the possibility of conspiracy by relying on *Copperweld*, where a parent-wholly owned subsidiary relationship obtained.

Second, petitioners may not hide behind the fact that some of the defendants were officers of Crown Life. These same defendants were simultaneously acting on their own behalf and as owners of Agency Holding. While "officers of a single firm are not separate economic actors pursuing

separate economic interests," *Copperweld,* 104 S. Ct. at 2741, individuals who act on their own behalf or who serve as officers of two unrelated entities are quite capable of conspiring with one entity while acting on behalf of the other. *See, e.g., H&B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391 (4th Cir. 1974). From the evidence presented in these cases, a jury could have reasonably concluded, as the court below observed, that Craig acted on behalf of Agency Holding; that Lloyd served in a dual capacity as officer of Crown Life and a person interested in Agency Holding; and that they were capable of conspiring with each other, with Agency Holding and with Crown Life. 734 F.2d at 142-43.

Moreover, players other than officers of Crown Life participated in this conspiracy. Early in the conspiracy, Craig resigned from Crown Life. 734 F.2d at 138. Bruce Pennamped, a private attorney in Indianapolis, Indiana, with no connection to Crown Life, incorporated Agency Holding and served as the nominal head of that corporation during part of the conspiracy. Another individual, Robert Oglevee, conspired with the other defendants to eliminate Malley-Duff and to take over the Ehrman Agency. The presence of these individuals who, acting in furtherance of their individual interests, were detached from the Crown Life corporate family, negates any inference that the characters to this conspiracy were acting with a unity of economic interests. *Cf. Copperweld,* 104 S. Ct. at 2741.

Finally, even if the conspiracy would be deemed intracorporate, the illegal nature of the creation of Agency

Holding removes this case from the rule established in *Copperweld*. Where the corporate subsidiary is formed for the very purpose of executing an illegal scheme, a violation of §1 is established. *Copperweld*, 104 S. Ct. at 2731, citing *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). The anticompetitive purpose of the founders of Agency Holding is clear: to eliminate Malley-Duff as a competitor to the newly formed Agency Holding affiliate. As the Court below characterized the product of the conspiracy: the "result was a pincers movement: to mortally wound Malley-Duff and at the same time to replenish the coffers of Agency Holding, the mega-insurance agency that directly or indirectly was to replace Malley-Duff." 734 F.2d at 143.

2. The Courts of Appeals are in agreement on the treatment of classic group boycotts

This case is not a typical distributor-termination case in which nonprice restrictions over territories are judged under the rule of reason. In typical cases, the manufacturer's strategy and efforts to compete in the inter-brand arena are given weighty consideration. In the instant case, Crown Life was not attempting to improve its competitive posture; the purpose of the conspiracy, instead, was to drive Malley-Duff out of business and thereby eliminate all competition from it. The Court below found that Malley-Duff produced sufficient evidence of a classic group boycott to warrant jury consideration. 734 F.2d at 142-43. Under the Third Circuit's strict construction of the group boycott theory, a *per se* violation exists when there is "a purpose . . . to exclude a person or group from the market. . . ." 734 F.2d at 141-42; *Larry V. Muko, Inc. v. South-*

west Pennsylvania Building and Construction Trades Council 670 F.2d 421, 430 (3d Cir.), *cert. denied* 459 U.S. 916 (1982); *DeFilippo v. Ford Motor Co.*, 516 F.2d 1313, 1318 (3d Cir), *cert. denied*, 423 U.S. 912 (1975). Here, the Court found just such an agreement in the efforts of Lloyd, Craig, Agency Holding and Ehrman.

The decision of the Court below that an agreement to drive an entity out of the market is illegal follows this Court's decision in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). Although no allegation of price competition was made in *Poller*, this Court determined that a conspiracy between a network and a broadcaster to eliminate another broadcaster from the market stated a cause of action under Section 1. Like the Third Circuit in *Malley-Duff, Larry V. Muko, Inc. and DeFilippo*, other Courts of Appeals have followed the teaching of *Poller* that conspiracies that have as their sole purpose the elimination of an entity from a business market is the type of pernicious conduct that is illegal *per se*.

The Seventh Circuit, which petitioners argue is squarely in conflict with the Third, has held that a boycott aimed at influencing the supply of a product must be analyzed under the *per se* rule. *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1155 (7th Cir.) (en banc), *cert. granted*, 104 S. Ct. 3553 (1984); *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Association, Inc.*, 672 F.2d 1280 (7th Cir. 1982). Clearly the elimination of major competitor is an attempt to destroy a line of supply and require all purchasers to deal on whatever terms are available from the conspirators. *Accord, Fount Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296,

1301 (9th Cir. 1978) ("If defendants did conspire to drive Lapin out of business, then a combination in restraint of trade existed which fits within the plain words of the statute.").

The cases cited by petitioners as conflicting with the decision below did not involve blatant conspiracies to eliminate business entities. They are further distinguishable from this case because they did not involve a conspiracy among competitors.

In *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978) the Second Circuit rested its application of the rule of reason on the fact that only a vertical conspiracy between a single supplier and a single distributor existed. *Id.* at 131. Had an agreement existed among competitors to exclude Oreck from the market, the Second Circuit acknowledged that the *per se* standard would have been appropriate. *Accord, Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957) (agreement between single supplier and single retailer); *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011 (9th Cir.), *cert. denied*, 104 S.Ct. 106 (1983). (No allegation of conspiracy involving *any* entity on same competitive level as terminated distributor); *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir.), *cert. denied*, 104 S.Ct. 242 (1983) (no evidence that competitors had agreed with each other to work toward termination; nevertheless, the Court recognized that "where the facts support a finding that competing distributors provoked a manufacturer to eliminate one of their number as a marketplace competitor, there is no need to proceed to the more finely tuned 'rule of reason' analysis." *Id.* at 1216).

Even the decision of the Seventh Circuit in *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Cos.*, 682 F.2d 660 (7th Cir. 1982) is not to the contrary. The Court expressly noted that it was not a case where a multiple number of actors on the same competitive level as the targeted company were involved. *Id.* at 663. The Seventh Circuit in *Products Liability* intimates, and other decisions of the same court state, that horizontal agreements such as the one in this case would be subjected to the *per se* test, *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1235 n.4, *reversed on other grounds*, 104 S. Ct. 1464 (1984); *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Association, Inc.*, 672 F.2d 1280 (7th Cir. 1982).

More importantly, this Court's decision in *United States v. General Motors Corp.*, 384 U.S. 127 (1966) clearly establishes that the *per se* rule applies when competitors band together and conspire to induce a single supplier to take action against one of their competitors. The fact that only a single supplier can take the anticompetitive act does not render the action unilateral as petitioners Crown Life and Lloyd suggest [Brief at 11-12] nor does it transform a horizontal conspiracy into a vertical one, as petitioners Agency Holding and Craig suggest [Brief at 7]. Rather, "where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct." 384 U.S. at 146.

The critical distinctions between Malley-Duff and all of the cases cited by petitioners as conflicting are the absence of an agreement to eliminate a supplier of goods

from the marketplace and the presence of multiple actors, e.g., Agency Holding, Craig and Ehrman, on the same competitive level who conspired to eliminate Malley-Duff from the market. The Courts of Appeals do not disagree on the applicability of the *per se* rule to agreements such as this. This Court does not search for a conflict when the facts of a case make it reconcilable with accepted precedents in all Courts of Appeals. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

3. The Court of Appeals' opinion does not contravene Monsanto Co. v. Spray-Rite Service Corp.

The termination of the Malley-Duff agency resulted from a classic group boycott. As the Court below found, there was sufficient evidence to support a jury finding that direct competitors of Malley-Duff—Craig, Lloyd, Agency Holding and Ehrman—conspired to eliminate Malley-Duff from the market. As this Court has long recognized, a "group boycott of even a single trader violate[s] [Section 1] without regard to the reasonableness of the conduct in the circumstances. Group boycotts . . . are among those 'classes of restraints which from their nature or character' were unduly restrictive." *United States v. General Motors Corp.*, 384 U.S. 127, 145-46 (1966), *quoting Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959).

This Court has also recognized that restrictions that originate in agreements among competitors of the targeted entity are horizontal in nature and trigger the *per se* rule. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 n.28. The boycott in this case was the brainchild of Lloyd, and included among others, Craig, Oglevee, the

Ehrman Agency, Pennamped and two Agency Holding corporations.

Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984) did not involve a conspiracy that originated among direct competitors of the targeted company. Individual competitors may have complained to the manufacturer, but no evidence demonstrated that they had agreed among themselves to induce the manufacturer to terminate the distributor. Here, by contrast, the direct competitors hatched their idea of taking over the market by driving Malley-Duff out of business and accomplished their illegal end through Lloyd who acted both as direct competitor and agent from Crown Life. Where, as here, the anti-competitive purpose and the resulting effects can be realized on the competitor level, the concerns of purely vertical restraints such as the one in *Spray-Rite* need not be addressed.

Moreover, the peculiar fact pattern of this case makes it an undesirable forum for deciding whether a group boycott must be motivated by price-fixing in order to trigger the *per se* rule. This conspiracy occurred within an industry where price is not a variable; rates are set by state regulatory agencies. The "central nervous system" of this highly regulated competitive format, then, cannot be price. The quality of services provided to consumers, however, may vary greatly within the system and is a basis for choosing one supplier over the other. A customer deprived of competition on the basis of quality is no less cheated of the benefits of a free-market system than one who is deprived of competition based purely on price, especially when state law prohibits price competition. The key consideration in boycott cases must be detriment; if

the customer in a regulated market is denied the benefits of competition in the only area untouched by regulation—service, the effect is as pernicious and anti-competitive as price-fixing in the traditional, unregulated model. As this Court stated in *General Motors, supra:* "Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely." 384 U.S. at 148.

4. The unusual facts of the case, the academic nature of Petitioners' concerns and the interlocutory state of the proceedings all counter-indicate the grant of certiorari

Unlike most dealer termination cases, the instant matter involved a complex scheme whereby Lloyd, an officer of Crown, was simultaneously acting for Crown and for his "ulterior cross purpose" with Agency Holding. 734 F.2d at 143. The cross-purpose involved not only ousting the existing marketers for Lloyd and his conspirators' benefit, but then looting Crown Life via a series of loans authorized by Mr. Lloyd himself. Crown Life did not know how much of its money Lloyd had lent to Lloyd's companies but believed the amounts to be between $5,000,000 and $8,000,000. Crown Life also did not know how much of the loans could be repaid or collected. These Byzantine transactions are far from the ordinary and recurring termination cases where the supplier's action is unilateral or suggested by competing dealers. The scenario of Malley-Duff is unlikely ever to recur.

In addition, petitioners expressly seek to involve this Court in an academic debate concerning economics and how to distinguish vertical from horizontal restraints. This

Court does not sit to resolve such matters nor should it be drawn into a factually dense area of law where any general rule of law enunciated would, in any case, allow for minor variations in application.

Finally, it should be noted that the mandate of the Court of Appeals is wholly interlocutory in that a new trial was ordered on the anti-trust issue as well as the state law questions. Consequently, there will be a new trial in any event and this factually unique case might be disposed of below without the necessity of a ruling by this Court.

CONCLUSION

For the foregoing reasons, Respondent, Malley-Duff & Associates, Inc. respectfully suggests that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 84-340

IN THE

Supreme Court of the United States

October Term, 1984

CROWN LIFE INSURANCE COMPANY, et al.,
Petitioners,

v.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

There Is No Factual Foundation For Respondent's Claim That It Was Put Out Of Business By The Termination Of Its General Agency Contract.

In its effort to get away from the great weight of authority to the effect that there must be a price motivation for an alleged group boycott to be given *per se* treatment, the Respondent argues for the first time that no price aspect is required if the purpose is to put the target out of business. That argument is not open to the Respondent in this case because there is no evidence to show that Malley-Duff was put out of business as a result of the alleged group boycott. The fact is that the only effect the termination of Malley-Duff's general agency contract had on its business was that it could no longer sell Crown products through brokers. It was still entirely free to sell Crown products directly to consumers. The fact that it did not do so was purely the choice of Malley and Duff, its principals. It was also perfectly free to become general agent for any of the hundreds of life insurance companies doing business in Pennsylvania and in fact Mr. Duff did just that, but under a different corporate name. Malley and Duff quite plainly let their corporation die in order to enable them to claim that their corporation had been put out of business and thus to increase their claimed damages.

The fact that Malley-Duff was still free to sell Crown insurance policies directly to policyholders makes such cases as *United States v. General Motors Corp.*, 384 U.S. 127, 145-46 (1966), and *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959) inapposite, as is also the boycott aspect of the Monsanto case in the Seventh Circuit: *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226 (1982), *aff'd*, 104 S. Ct. 1464 (1984). Respon-

dent's reliance on *Larry V. Muko, Inc. v. Southwest Pennsylvania Building and Construction Trades Council*, 670 F.2d 421, 430 (3d Cir.), *cert. denied*, 459 U.S. 916 (1982) is misplaced for the same reason.

The only case relied on by the Respondent, which it claims did not involve the price aspect, is *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), and there by a five to four vote this Court reversed the granting of a summary judgment, the majority indicating that, particularly in antitrust cases, summary judgment should be granted very sparingly. In the case at bar, the defendant's motion for summary judgment was refused and it was not until the plaintiff had had full opportunity to prove its case that a directed verdict on the antitrust counts was granted to the Petitioners, at trial after the Respondent had rested its case. More than that, *Poller* is not a boycott case—no boycott was claimed, and neither the majority opinion nor the dissent mentions boycott. Of course, in the case at bar a boycott is claimed to escape the McCarran-Ferguson exemption.

The case of *DeFillippo v. Ford Motor Co.*, 516 F.2d 1313 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975), cannot be authority for the Respondent, because it was found that no boycott existed. Respondent misstates the holding in *Marrese v. American Academy of Orthopedic Surgeons*, 726 F.2d 1150 (7th Cir.), *cert. granted*, 104 S. Ct. 3553 (1984), as the following from the opinion (p. 1155) demonstrates:

> . . ."boycotts are illegal per se only if used to enforce agreements that are themselves illegal per se—for example price-fixing agreements" . . .

* * *

> The complaint in the present case charges either a conspiracy to fix prices or limit output, a per se offense under federal as under Illinois law, or, more likely, a non-price conspiracy to exclude rivals from a professional association, which under our precedents must be tested under the Rule of Reason —and the state law is again the same.

Two other points the Respondent seeks to make deserve brief mention. While it is true that this Court's decision in *Copperweld Corp. v. Independent Tube Corp.*, 104 S. Ct. 2731 (1984) was not urged upon the Court of Appeals for the Third Circuit, that is because the decision had not been handed down until after the briefs were in and the case was argued. However, the argument was made that the requisite multiplicity of parties was not present.

The statement on page 6 of Respondent's brief that "Crown Life was not attempting to improve its competitive posture," is untrue. That is demonstrated by the Respondent's own exhibit, relevant portions of which are set forth in Appendix H1-3, which makes plain the reason for the Respondent's termination as Crown's general agent in Western Pennsylvania. Although Crown's percentage of the United States market in individual sales in 1977 reached a level of .53%, Malley-Duff's percentage of the Western Pennsylvania market was only .11%. Even with the addition of the personal production of the Ehrman Agency, the total percentage of market sales came to less than .2%. Thus the Respondent's own exhibit proved the justification for Crown's termination of the Respondent; that is, that it had failed to make an adequate penetration of the Pittsburgh market.

A decision by the United States Court of Appeals for the Fifth Circuit, that had not been reported when the

Petition for Writ of Certiorari was served, deserves mention. It is the case of *Hood v. Tenneco Texas Life Insurance Co.*, 739 F.2d 1012 (5th Cir. 1984), where summary judgment was granted to the insurance company in the District Court and the Court of Appeals for the Fifth Circuit affirmed, relying on this Court's opinion in *Copperweld.*

CONCLUSION

For the foregoing reasons, as well as the reasons advanced in the Petition For a Writ of Certiorari, Petitioners Crown Life Insurance Company and Clarke Burton Lloyd respectfully ask that the Petition For a Writ of Certiorari be granted.

Respectfully submitted,

November 1984

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